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In The Supreme Court of the United States

PATRICIA B. BURNS,

Petitioner,

v.

UNINET, INCORPORATED, and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,

Respondents.

ON PETITION FOR *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT* OF *CERTIORARI* and APPENDIX (VOLUME I OF II)

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QUESTIONS PRESENTED

I. DOES THE CLEARLY ERRONEOUS STANDARD OF REVIEW APPLICABLE TO A JUDGMENT GRANTED PURSUANT TO FED. R. CIV. P. 52 REQUIRE THE COURT OF APPEALS TO REVERSE A DISTRICT COURT JUDGMENT BASED IN PART UPON FACTS NOT PRESENTED AT TRIAL?

II. IS A JUDGMENT BASED IN PART UPON FACTS NOT PRESENTED AT TRIAL A DENIAL OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

III. UNDER TITLE VII OF THE CIVIL RIGHTS ACTS OF 1964, U.S.C. § 2000 (e-3) AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991 IS DIRECT EVIDENCE OF DISCRIMINATORY INTENT REQUIRED TO AVOID JUDGMENT AS A MATTER OF LAW FOR THE EMPLOYER?

IV. DOES FED. R. CIV. P. 39(b) REQUIRE A DISTRICT JUDGE TO CONSIDER FACTORS OTHER THAN THE VIOLATION OF FED. R. CIV. P. 38 WHEN CONSIDERING A MOTION FOR JURY TRIAL PURSUANT TO FED. R. CIV. P. 39(b)?

PARTIES TO THE PROCEEDING

The petitioner is Patricia B. Burns who is an individual residing at 694 Republican Street, Paris, Virginia 20130.

The respondents are UniNet, Inc. ("UniNet") and Southeastern Computer Consultants, Inc. ("SCCI"), Virginia Corporations with registered agents in Fredericksburg, Virginia and offices in Frederick, Maryland, Herndon and Virginia and doing business in the Commonwealth of Virginia, the State of Maryland and the District of Columbia. John Bjorn was named as a defendant in the complaint, but dismissed by order of the District Court which was not appealed.

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Patricia B. Burns, by counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 18a)[1] is unreported. The opinion of the district court (App. 2a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 2000. A petition for rehearing was denied on May 2, 2000. (App. 33a). This Petition for Writ of Certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] "App." refers to the appendix included with this petition and the separately-bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FED. R. CIV. P. 38. Jury Trial of Right states in pertinent part:

> (a) *Right Preserved.* - The right of trial by jury as declared by the Seventh Amendment of the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) *Demand.* - Any party may demand a trial by jury of any issue triable or right by a jury by (1) serving upon the other parties a demand therefor

in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(d) *Waiver*. - The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

FED. R. CIV. P. 39(b). Trial by Jury or by the Court.

(b) *By the Court*. - Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

FED. R. CIV. P. 52. Findings by the Court; Judgment on Partial Findings.

(a) *Effect*. - In all actions tried upon the facts

without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) *Amendment*. - On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings - or make additional

findings - and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) *Judgment on Partial Findings*. - If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

STATEMENT

Patricia B. Burns ("Burns") filed this action in the United States District Court for the Eastern District of Virginia against respondents UniNet and SCCI, *enter alia*, on grounds that she was discriminated against by respondents on account of her sex which adversely affected her employment conditions and that her employment was terminated in retaliation for having filed a complaint of sexual harassment with the Equal Employment Opportunity Commission ("EEOC"). The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1367 (a) and 42 U.S.C. § 2000 (e) (5) (f). The United States Court of Appeals for the Fourth Circuit had appellate jurisdiction to review the final decision of the District Court pursuant to 28 U.S.C. §§ 31 and 1291.

A. Course of Proceedings. Burns filed her complaint on March 19, 1998. On May 11, 1998, a scheduling order was entered by the district court setting a pretrial conference for September 17, 1998. At the pretrial conference petitioner discovered that the request for a jury trial had been omitted from the complaint. On September 21, 1998, petitioner filed a motion for a jury trial. On October 30, 1998, the motion for a jury trial was denied as were respondents' motion for summary judgment on Counts I, II and IV. The trial occurred on December 10, 1998. At the conclusion of petitioner's case, the district court granted respondents' motion for judgment pursuant to FED. R. CIV. P. 52.

The judgment of the district court is based, inter alia, upon fifteen specific findings of fact which are entirely without basis in

evidence presented at trial either direct or by inference but have their genesis in respondent's Proposed Conclusions of Law and Findings and Fact copied verbatim into the district court opinion.[2] Forty-six of the forty-eight paragraphs which comprise the memorandum opinion of the district court were copied verbatim or nearly verbatim from the proposed findings of fact and conclusions of law filed by respondents in advance of the trial. App. 35a.[3]

In her briefs in the court of appeals, Burns set forth the findings of fact which were not supported by the evidence. In its opinion denying Burns' appeal, the Fourth Circuit declined to specifically address any of the factual discrepancies or the impact of the absence of support for those factual findings.

In affirming the denial of a motion for a jury trial pursuant to FED. R. CIV. P. 39(b) based upon a failure to comply with FED. R. CIV. P. 38 the Fourth Circuit considered only Burns' counsel's admission of fault in failing to make a timely request for a jury trial. App. 32a.

B. Burns' Evidence of Sexual Discrimination, Retaliation and the District Court's Findings of Fact. Burns presented

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[2] Identified herein by bold print with citations to the record. The first reference following bold print is to the district court opinion and the second to the appendix page and paragraph number of respondent's pleading.

[3] There exist additional findings of fact in the district court opinion which are unsupported by trial evidence. Only those most unfavorable to Burns are cited.

evidence that John Bjorn ("Bjorn"), President of UniNet, engaged in a pattern of behavior expressly directed at women for the purpose of pursuing a romantic relationship. The pattern consisted of a period of extremely solicitous personal attentiveness toward the object women, including privileges and professional favors. After a time, if no romantic response occurred, the solicitousness, privilege and assistance were withdrawn and replaced with a course of retaliatory behavior designed to adversely affect the women's work performance and ultimately drive them from the company. The pattern was proven with Maureen Kearns ("Kearns"), Sue Foreman Temple ("Temple") and Burns. The evidence further revealed that Bjorn engaged in a personal relationship with a fourth female employee at the time of Burns' termination in 1995. With regard to each of the target women who testified, the district court made certain factual findings purportedly based upon the testimony but in fact precisely opposite to it.

On November 23, 1994, Burns notified management of UniNet and SCCI by memorandum that she was the victim of discrimination perpetrated by Bjorn. On November 28, 1994, she filed a complaint of sex discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). On March 9, 1995, her employment was terminated without just cause.

C. The Record. UniNet is a company in the business of supplying computer hardware, software, communications and training to customers. Plaintiff's Exhibit, hereinafter "PE" 108[4]

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[4] Certain exhibits have been lodged with the Clerk of the Court.

Final authority to determine employee salary increases, terminations and various other financial and administrative functions of UniNet, Inc. is vested in the President of SCCI. PE 108. Burns was initially hired by UniNet in December of 1990 by Bjorn and resigned in late 1992. App. 276a, 302a.

During the first employment period, Burns' manager was Todd Heidelberger ("Heidelberger"). App. 276a. Although Heidelberger was her manager, Bjorn accompanied her on almost all of her sales calls during her first year. App. 276a, 277a. While on sales calls, Bjorn routinely advised prospective customers that UniNet was owned by SCCI. App. 280a. It seemed to Burns that Bjorn had taken a liking to her. He "hung around" her desk. He talked to her about problems in his marriage and asked her out for drinks on numerous occasions. Bjorn did not provide the same kind of assistance to others which he provided to Burns and she became concerned that he had other motives. App. 281a. Contrary to the testimony of Burns and Kearns, the district court found that **"Bjorn, with respect to Burns' training, provided sales assistance, evaluated her performance, and treated her the same as other sales representatives**." App. 3a, 38a ¶ 12.

Bjorn asked Burns out for drinks on so many occasions that finally she consented to go on the assumption that others from the company would be present. App. 285a-286a. When Burns arrived at the restaurant, no others from UniNet were present but nevertheless she sat at the bar with Bjorn and had a few drinks. Burns attempted to keep the conversation on matters related to sales techniques and leads; however, Bjorn continually moved the discussion to personal matters. App. 286a. They stayed for about

an hour. Bjorn left Burns briefly to speak with an acquaintance and returned advising Burns that the acquaintance thought Burns was having an affair with Bjorn and that he thought it was "funny". Burns disagreed. Burns advised him that she was forty years old and Bjorn who was twenty-nine expressed surprise. Burns terminated the meeting by advising Bjorn that she was leaving to return home to her daughter. App. 287a-289a.

Thereafter, the solicitous behavior and flirtations of Bjorn stopped. App. 289a. Not only did the flirtations stop, but Bjorn refused to respond to Burns' sales needs. App. 290a. In addition to the withdrawal of sales assistance, Bjorn began to belittle Burns and berate her about her job performance in front of others. App. 292a. Bjorn's continued unjustified ill treatment of Burns increased to the point that it seemed that he was stalking her to cause her upset. App. 295a. She reported the events to Heidelberger advising him that she felt that she was being harassed; that the treatment was unacceptable and requesting that he do something about it. App. 297a. When asked whether the harassment was "sexual harassment", Burns advised that she didn't know what kind of harassment it was, but that it was harassment and she wanted it stopped. App. 298a. **The district court's finding that Burns expressly denied that the harassment was sexual, stating, "no, more emotional harassment" is not within the evidence presented.** App . 4a, 39a ¶ 20.

Heidelberger arranged a meeting with Bjorn who agreed that the accusations were serious, but advised Burns that the problems were hers. App. 299a, 300a. **The district court's finding that, "Heidelberger reported to Bjorn that Burns was complaining**

about company policies" is not within the evidence presented at trial. App. 4a, 39a ¶ 18. In late 1992, Burns' customers were falling off and she received constant complaints that customer orders were not being filled on time. Burns stated she could not make it at the company without the cooperation of Bjorn; could not take the humiliation, and therefore was forced to quit. App. 302a-303a.

Heidelberger confirmed that Burns was a great employee; that she brought in business; showed up on time; was responsible and followed directions. Burns advised him that Bjorn had been emotionally harassing her. App. 139a. She was upset and shaking when she described the harassment to him. Burns advised Heidelberger in 1992 that she quit UniNet because she was uncomfortable with Bjorn. App. 140a. **Contrary to Heidelberger's testimony and absent from the evidence presented the district court found as a matter of fact: "During the later part of Burns first period of employment, she began failing or refusing to make cold calls to increase UniNet's customer base. She also failed and/or inadequately untimely prepared returned merchandise authorization forms ("RMAs") to document returned equipment for credit, causing UniNet to lose money. Bjorn criticized and counseled Burns and others for these acts. Burns, however, did not adhere to Bjorn's directions."** App. 3a, 38a ¶ 16.

While working for a temporary agency in October of 1990, Kearns was assigned to UniNet when Bjorn solicited her to work full-time as a receptionist with some bookkeeping duties. App. 177a-178a. Kearns accepted and commenced employment at the

end of November of 1990. She described Bjorn as being very friendly toward her. He spent a lot of time in front of her desk talking to her, flirting with her and paying more attention to her than any other women in the office. App. 173a-175a. **Contrary to this testimony and absent from the evidence presented the district court found as a matter of fact that Kearns initiated personal conversations with Bjorn and that Bjorn did not spend a disproportionate amount of time around her.** App. 6a, 42a ¶ 33. Bjorn talked to her about drinking stories, and appeared to be trying to bond with her since she had recently graduated from college. Bjorn asked her to accompany him for drinks after work, but she declined. App. 171a. Whenever Kearns asked to leave the office early Bjorn always consented. She eventually stopped asking because she thought there was more to his being friendly and did not want to give him the impression that she was at all interested in him. App. 176a.

After Burns commenced her employment, Kearns noted that Bjorn shifted his attention to Burns. Bjorn acted in exactly a similar manner toward Burns that he had formerly acted toward her. He stood in front of Burns' desk and flirted with her and did all of the things that he had formerly done with Kearns. Kearns was relieved because the pressure was then off of her. App. 176a-177a. In January of 1991 when Kearns brought to Bjorn's attention expense reports of an employee which she considered to be improper, Bjorn became upset with her, threw papers at her and uttered an expletive to her. App. 177a-180a. Kearns advised Bjorn that she couldn't tolerate such treatment and requested a new position. Kearns also noted that Bjorn's attitude towards

Burns was changing. She heard Bjorn yell at Burns and considered his treatment of her to be completely unprofessional. App. 181a. Kearns was transferred to hardware sales and two days later to sales of maintenance contracts, a more difficult position than other positions within the company. App. 180a. After being transferred to maintenance sales, Bjorn provided no assistance to her; whereas, he had provided extraordinary assistance to her while in the position of receptionist. When Temple was hired, Kearns observed that the focus of Bjorn's attention was then shifted from Burns to Temple as it had been shifted from her to Burns.

Temple was hired by Bjorn in 1992. She received her training as a sales representative from Bjorn. App. 196a. Unlike Burns and Kearns, Temple attended after hours social functions with employees of UniNet including Bjorn. App. 197a. Upon her departure from a "happy hour" attended by several people from UniNet, Temple was at her car when Bjorn pulled up to her and asked her to approach his vehicle. After some discussion, Bjorn leaned over and kissed her. App. 198a. The next day Bjorn called Temple into his office and asked her how she felt about the incident. Temple advised him that she was surprised and that it was somewhat upsetting. She said that they both agreed to "just forget about it as if it did not happen". App. 198a-199a. Temple was given special attention by Bjorn with sales assistance. App. 199a. In addition to the kiss, Bjorn engaged in other comments which caused her to believe that Bjorn wanted to have a romantic relationship with her. App. 201a. Temple described the atmosphere in the workplace as being very flirtatious toward her

in a continuing manner. Temple said that the flirtatious conduct at the office was directed solely toward women and not toward men. App. 201a-202a. On a sales call in Washington, D.C., Bjorn told Temple that he "did not fool around on his wife, but if she was interested that he would be". App. 202a-203a. Temple was intimidated by the proposition and viewed it as unprofessional. App. 202a-203a. Bjorn spent an excessive amount of time at her desk and a great deal of time with her. App. 207a. **Contrary to Temple's testimony and unsupported by other evidence in the record the district court found as a matter of fact: "Another employee, Sue Foreman Temple, testified she leaned into Bjorn's car in a parking lot and kissed him after Bjorn and Temple had been drinking heavily after work. Bjorn never asked Temple for sex, never asked Temple out on a date, and he did not engage in any unwelcome conduct toward her. Temple testified Bjorn never touched her in an unwelcome manner."** App. 6a, 42a ¶ 34. Several months after the incident of the kiss and the proposition she described what had occurred to her manager, John Lyons ("Lyons"). Shortly thereafter she was fired by Lyons and Bjorn. App. 207a-209a.

After her resignation, Burns was contacted by Heidelberger who advised her that UniNet had established an office in Frederick, Maryland and that he wanted her to return. App. 304a. Burns advised him that she feared that if she returned that the ill treatment of Bjorn toward her would resume. Heidelberger told her that the Frederick office was "fairly autonomous from Bjorn" and that she would need have very little contact with him. He further advised her that she would have an unlimited sales territory

except for the northern Virginia area which was covered by the Herndon office. App. 305a. **Contrary to the testimony of Heidelberger and Burns and unsupported by any other evidence in the record the district court found as a matter of fact that: Sales managers Heidelberger, Gavitt and Lyons, divided up UniNet's sales territory around the Frederick and Herndon offices and that Burns was aware of the division of the sales territories when she became re-employed.** App. 8a, 45a ¶ 49. Heidelberger described Burns' territory as "open territory [means] there are no boundaries, that a sales rep has the ability to sell in whatever general area we are working in." App. 150a.

Heidelberger assured Burns that he would provide all assistance necessary. In reliance upon those representations in October of 1993, Burns accepted the position of Senior Sales Representative for the Frederick, Maryland office of UniNet at a base salary of $25,000 per year plus commission. App. 305a. From October of 1993 until March of 1994, Burns had no problems with either co-employees or any management personnel. App. 306a-307a.

In March Heidelberger announced his departure. Burns discussed the Frederick management position with Leo Harris (chairman of the Boards of UniNet and SCCI) who advised her that he had considered offering the position to her. Thereafter, Bjorn who served as acting manager of the Frederick office, approached Burns in the warehouse and advised her that she was welcome to apply for the management position, but that the pay would be only $35,000 per year and that he would be on her constantly if she took the position. App. 310a-311a. Burns

declined the position as a result of the fact that it would have required her to report directly to Bjorn. App. 311a.

Later Bjorn approached Burns at the copy machine and asked her if she had heard he had separated from his wife. Bjorn complained that he could not seem to find a woman who could "so much as boil a pot of water" and that he was sick of women who were interested only in their careers. App. 312a. Bjorn gave Burns the impression that he was looking for someone to go out with. App. 313a.

Between March and May of 1994, while acting manager of the Frederick office, Bjorn questioned Burns concerning her calls to customers in Washington, D.C. and threatened that he would restrict her from that territory. App. 314a. In April of 1994 Burns received an extension of her base salary of $25,000.00. The district court's finding that, **"Burns requested the extension of enhanced salary from Chairman Harris in violation of UniNet's chain of command. Burns did not address the salary extension with her immediate supervisor or with Bjorn"** (App. 8a, 44a-45a ¶ 46) is in exact opposition to the evidence presented at trial through the testimony of Burns and Respondents' exhibit 37 (App. 449a) revealing that the request was made to Bjorn who was then acting sales manager and President. Eventually Pam Edelman ("Edelman") was hired as the manager of the Frederick office.

Burns sales territories were changed on two occasions. First she was restricted from calling on customers in Washington, D.C. and relegated to the territory known as the I-270 corridor which was the area from outside Frederick, Maryland to the boundary of

Washington, D.C. Later Bjorn reduced Burns' sales territory to the area within a single zip code in the I-270 corridor in Rockville, Maryland. App. 318a. The reduction of her sales territory drastically limited Burns' ability to acquire large accounts which had been her major source of income and were largely unavailable in the restricted sales territory. **There was, however, no evidence to support the district court's factual finding, "that Burns continued to attempt to call on customers in D.C. and refused to accept the division prescribed by management".** App. 8a, 45a ¶ 49. In regard to the division of territories, the district court also made the following findings of fact which are wholly unsupported by any evidence presented at trial: **The Frederick territory was divided around the sales representatives in accordance with their wishes and Burns demanded the most lucrative territory in Maryland, leaving other sales representatives with little or no productive territory. Burns complained whenever another sales representative contacted a potential new customer in her territory and Burns did little or no cold calling herself to increase the amount customers in her territory.** App. 8a, 45a ¶ 50.

In October of 1994, Bjorn's quoted delivery time for sales of computer equipment was five to seven business days. Burns' deliveries were delayed as long as twenty-one business days causing Burns to lose three accounts. Others at UniNet did not experience the same delivery problems. App. 319a. Burns felt that Bjorn was purposely re-prioritizing her orders to a position behind other sales representatives as he had done in 1992. App.

320a-321a. A meeting was scheduled at Frederick in November with Bjorn, the sales representatives and Edelman. App. 321a. Upon the commencement of the meeting, Bjorn pointed his finger at Burns and acknowledged the allegation that her orders were being purposely withheld. Bjorn stated to Burns in the presence of all that if she didn't like it that she should get a job selling shoes. Burns was humiliated by Bjorn's comment to her in front of the other sales representatives and her manager. App. 323a-324a.

On November 23, 1994, Burns submitted a memorandum to Bjorn with copies to Edelman and Harris lodging a formal complaint of Bjorn's harassment. PE 34. A meeting was then scheduled at SCCI with UniNet management, the personnel manager at SCCI (App. 333a) and Ed Bjorn (John Bjorn's father and president of SCCI). During the meeting, Burns advised that she had left UniNet in 1992 because of Bjorn's harassment of her. She described Bjorn's initial flirtations and assistance and the sudden change in his behavior toward her consisting of harassment to the point that she was forced to quit. Burns stated that Temple had told her that Bjorn had flirted with her and thereafter she was terminated abruptly for unjustified reasons. Burns also advised that Bjorn was then dating another UniNet employee. App. 334a. She perceived that no relief would result from the meeting. App. 338a-339a. On November 28, 1994, she filed a complaint of sex discrimination with the EEOC. App. 338a.

Immediately after the filing by Burns of the EEOC complaint, new rules and regulations were established for the Frederick office. App. 334a-335a. Following the revised policies and procedures of December 5, 1994, and continuing through her

termination on March 10, 1995, Burns described constantly shifting policies and procedures. Burns was particularly subjected to conflicting and discriminatory policies. The UniNet policy for a sales representative to obtain the shipping date of an order was changed several times after the filing of her EEOC complaint. App. **In regard to the sales orders policy, the district court made the following finding of fact which is wholly unsupported by the evidence: Burns was warned by her immediate supervisor, Pam Edelman, that she was not permitted to call other personnel to check on the status of sales orders; that Burns had disregarded the warning and violated established policy by regularly contacting both Beisemeyer and Mossburg without sales manager approval or knowledge to seek exceptions to established purchasing policies**. App. 11a, 50a-51a ¶¶ 72, 73.

Diana Wilson was employed at UniNet from January of 1994 through March of 1995 and assigned the responsibility of answering the phone. She had been instructed by Bjorn on a particular occasion to refuse to connect Burns' calls to the purchasing agent. App. 238a. At the same time, she was unaware of any policy which restricted sales persons from contacting the purchasing agent and in fact, sales representatives frequently called the purchasing agent to check on orders. App. 241a. When she was directed not to connect Burns' calls to the purchasing agent, Burns' calls were no greater in number than calls made by other sales representatives to the purchasing agent. App. 252a. **Contrary to Wilson's testimony and unsupported by other evidence, the district court found as fact, "On one occasion,**

Burns called Beisemeyer so many times to seek approval of a special order that Bjorn instructed Beisemeyer not to accept any more calls from Burns that day so that Beisemeyer could perform her regular purchasing duties. App. 11a, 50a-51a ¶ 73.

After the filing the EEOC complaint new quotas and responsibilities were placed upon Burns and as a result of UniNet's failure to make prompt deliveries to her customers Burns was losing customers, but no one seemed to care. App. 350a-351a. Near the end of January, 1995, Harris advised Burns that the internal investigation of her complaint was complete and scheduled a meeting with him and Morrell for January 25th. App. 352a. Harris stated that the company found no evidence of sexual harassment or harassment on any basis. App. 353a. Harris told Burns that the EEOC investigation was "costing a lot of time and money and that she was the only one that could make it go away". App. 354a-355a. Within a week of the meeting John Lyons became manager of the Frederick office and enacted another new set of policies and procedures. App. 356a-357a. On January 31, 1995, Lyons issued a memo regarding policy and procedure review at the Frederick, Maryland office. App. 439a. The memorandum provided for probation prior to termination.

Burns was unjustifiably placed on probation at the beginning of February; when she objected the probation was rescinded. **The district court's following finding of fact regarding the memorandum which removed Burns from probation is contrary to the language of the memorandum and entirely without basis in the record: "however, in the notice removing**

her from probation, Lyons specifically directed, and Burns acknowledged, to cease complaining about UniNet's sales and order policies and to start selling." App. 11a, 52a-53a ¶ 80, (memo at 432a). At the end of February, Lyons provided a performance review to Burns stating that she was cooperative; had a great attitude; that he enjoyed working with her and that her sales were "great". He also commented that her technical skills were better than he originally thought they were. App. 358a-359a. When Burns asked Lyons to put the review in writing, he said he needed to speak with Bjorn. Lyons went to Herndon and returned advising Burns that he was prohibited by Bjorn from giving her a written review. App. 359a.

Immediately following the review, a series of unusual events occurred. Burns' largest account was Loudoun Hospital which was one of the largest accounts that UniNet had ever had. Burns had an excellent working relationship with the hospital. After Bjorn commenced a policy of holding orders for customers sixty days in arrears on payments, she had emphasized to Loudoun Hospital the importance of being current in its payments. By March of 1995, the hospital was current in its payments for the first time since it had been a customer of UniNet. App. 361a. In spite of that fact, Bjorn advised Burns by telephone that he planned to visit the hospital to discuss its past payment problems. App. 362a. Loudoun Hospital contacted Burns regarding the proposed meeting and consequently she wrote a memorandum to Harris inquiring whether it made good business sense to discuss past payment problems with UniNet's largest customer when its account was then, in fact, current. Harris met with Burns and

advised her that Bjorn was scheduled to meet with Loudoun Hospital for a "good will visit". When Burns relayed what Bjorn had said concerning his purpose for the visit, Harris ignored her. App. 363a-364a.

On the day that Burns learned that it was certain that Bjorn would visit her major account, potentially destroying the relationship which Burns and UniNet had with the account, Burns suffered what she later learned from her doctor was a panic attack. App. 365a. As she typed a memorandum to Harris concerning the affair, Burns began shaking and had a horrible feeling. She could not understand what was happening to her and was very fearful. At the time of the attack there was no manager in the office. After finishing and sending the memo, she was physically unable to remain for the balance of the day. App. 365a-366a. **The district court made the following finding of fact regarding the incident: On March 9, 1995, Burns left work without notice. She walked out after her supervisor had left the office and claims to have faxed a note to Bjorn and SCCI President, Ed Bjorn, further complaining about decisions and actions of UniNet.** App. 11a, 53a ¶ 83. There was no dispute over the fact that Burns had actually telefaxed notice of her departure to the individuals indicated. There was no evidence regarding the presence or absence of her manager or other supervisor at the office at any time on the date in question.

When Burns returned to work the following day, Lyons advised that her employment was terminated for leaving work early without a manager's approval and because she was unable to follow company procedures and guidelines. App. 366a. Burns

testified that she had not refused to follow any company procedure or guideline nor was she ever advised by anyone at UniNet that she had violated a company procedure or guideline. App. 366a. Burns was not on probation at the time of her termination.

In response to an interrogatory, UniNet identified each instance of a failure to follow a policy or procedure by Burns which served as cause for Burns' termination (App. 444a-446a) and stated only that Burns had not obtained management approval prior to leaving work on March 9th. UniNet had no policy for a sudden illness; the sick leave policy in UniNet's handbook does not address sudden emergencies. PE 108. The interrogatory response inaccurately reflects the content of Burns' March 9th memo. **The district court's finding that "On March 10, 1995, UniNet discharged Burns for failure to perform in accordance with UniNet's policies, procedures and management guidelines"** (App. 11a-12a, 54a ¶ 84) is contrary to Burns' testimony and the reasons stated by respondents in response to interrogatories, the only evidence before the district court on the subject. Burns testified that it was her desire to keep her job at UniNet. App. 409a.

Dr. Charles C. Titus, a Board Certified psychiatrist, testified that at a session on March 14, 1995 Burns advised him that she had been fired and that the firing was a major surprise for her because she had received a great review the week prior to the firing. Dr. Titus stated that the symptoms of a panic attack included extreme fear, rapid heartbeat and a conviction that one was going to either pass out or die. He said a panic attack is the most extreme form of anxiety that we know. App. 99a-103a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Misapplied the Clearly Erroneous Standard of Review Applicable to a Judgment Granted upon Motion Pursuant to FED. R. CIV. P. 52 by Entirely Disregarding the District Court Findings of Fact Wholly Unsupported by the Evidence and Incorporated into the District Court's Memorandum Opinion from the Prevailing Party's Proposed Findings of Fact and Conclusions of Law.

The Court has commented with disfavor upon the district court practice of allowing findings of fact and conclusions of law required by FED. R. CIV. P. 52(a) to be drafted by counsel for the prevailing party. In its comments, the Court has stated that such findings leave much to be desired in light of the function of the trial court, but that the findings are nonetheless the findings of the district court. They must stand or fall depending upon whether they are supported by the evidence. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985), United States v. El Paso Natural Gas Co. et al., 376 U.S. 651, 656 (1964). United States v. Crescent Amusement Co., et al., 323 U.S. 173, 185 (1944). To date only those cases which stand have been considered by the Court. The case at bar is a case which much fall. When considering whether the facts are supported by the record of a judgment rendered pursuant to FED. R. CIV. P. 52, the appellate court is bound to apply the clearly erroneous standard. A decision is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985). It is patent that such a standard of review is highly deferential to the factual findings of the district court; however, it is equally patent that the appellate court must review the entire record.

> The conclusiveness of a 'finding of fact' depends upon the nature of the materials on which the finding is based. The finding even on a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact', it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may be appropriately drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this court. Bose Corporation v. Consumer's Union of the United States, Inc., 466 U.S. 485, 501, (1984).

In this instance, the findings of fact designated herein have no basis in evidence. The requirement that special deference be given to a trial court's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. Bose, Id. Where findings of fact are exhibited to be contrary to the evidence and without support in evidence, then there can be no presumption of correctness and instead the taint

of the improper considerations must be deemed to infect the entire process. The essence of the judicial function is to arrive at judicial determinations based solely upon the evidence presented.

The Fourth Circuit's opinion recites that it had examined the record and was constrained to reject Burns' contention that the district court's "critical" (emphasis supplied) findings were not rooted in the evidence presented at trial. The opinion refers to, but does not address, the fifteen factual discrepancies designated by Burns. App. 26a. It is thus, apparent that when reviewing the district court's fact finding process, the Fourth Circuit entirely disregarded factual findings unsupported by the record and based its decision strictly upon its review of those findings of fact for which the Fourth Circuit found support in the evidence without considering the impact of the unsupported factual findings. The error of such a process is that it is fundamentally unfair. The appellate court went on to state that the district court merely rejected, as it was entitled to do as fact finder, the inferences upon which Burns' claims of sexual discrimination and retaliation relied. App. 27a. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those who duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Lavender v. Kurn, 327 U.S. 645, 653, (1946). Where a finder of fact has arrived at factual conclusions which have no evidentiary basis and/or which are contrary to the clear and unequivocal testimony of witnesses, then any reliance upon such a fact finder to reach "the most reasonable inference" is misplaced. Human experience dictates that one who

makes adverse determinations against another without any basis will, when provided the opportunity to consider the impact of an actual fact most likely find adversely again. The fifteen discrepancies cited are baseless factual findings which serve to erroneously negate affirmative testimony of Bjorn's pattern of gender based behavior or to add facts in support of allegations of poor or insubordinate work behavior by Burns not presented at trial. The district court having reached such negative conclusions upon its own notions can hardly be relied upon to have viewed the evidence impartially. The probability is that the unsupported facts served as predicates for arriving at inferences adverse to Burns and rejection of inferences favorable to her. In view of the record, there can be no reliance upon the district court to have impartially and objectively considered the inferences which would logically flow from Burns' evidence.

II. A Judgment Based upon Facts Not in Evidence Is a Denial of Due Process. The trial record confirms the absence of evidentiary support for the factual findings cited. Those factual findings are in numerous instances contradictory of the witness testimony. (e.g. different treatment of Burns by Bjorn; Bjorn's initiation of conversations with Kearns; kissing and propositioning of Temple). In fact, in its recitation of the facts, the Fourth Circuit correctly recited that Bjorn had kissed Temple (he kissed one of his subordinates, App. 22a) in contrast to the district court's finding that Temple had kissed Bjorn. It is axiomatic that the judgment of court must be based upon the evidence presented at trial. A judgment is "the decision or sentence of law pronounced by a court or other competent tribunal upon the matter contained

in the record. A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS, § 2 (4TH ed. 1892).

The affirmation of the district court judgment by the court of appeals is an error of constitutional proportions. A fair trial in a fair tribunal is a basic requirement of due process. Our system of law has always endeavored to prevent even the probability of unfairness. Withrow v. Larkin, 421 U.S. 35, 46, (1974). The limitation of consideration of facts in all judicial proceedings to those which are supported by evidence presented to the tribunal which renders the decision is an indispensable element of every trial which may be deemed "fair". The converse is equally true, i.e., a trial in which consideration of facts not presented in evidence occurs is by definition a deprivation of a fair trial. When the decision is based in any part upon the finding of a factual occurrence pre-dating[3] the proceeding under consideration which has no evidentiary support the probability of unfairness exits. To perform its high function in the best way, justice must satisfy the appearance of justice. In re: Murchison, 349 U.S. 133, 136, (1955).

The decisions of this Court are clear and unequivocal that in criminal proceedings, consideration of matters outside the record or even the possibility of consideration of matters outside the record is a denial of due process. Taylor v. Kentucky, 436 U.S. 478, 483, (1978). Noto v. United States, 367 U.S. 290, 297,

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[3] This Court has approved consideration of certain circumstances occurring after the proceeding, but not those which pre-date it. See: Dakota County v. Gliddon, 113 U.S. 22 (1885).

(1960). It has not, however, been pronounced in unequivocal, positive and clear language that in civil cases the same commonly recognized standard must prevail as a matter of right guaranteed to the people by the Fifth Amendment to the United States Constitution.

Section 15 of the Virginia Declaration of Rights, drafted by George Mason and unanimously adopted by the Virginia House of Burgesses on June 12, 1776 is no less applicable today than it was then: "That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality and virtue and by frequent recurrence to fundamental principles". DECLARATION OF RIGHTS (1776), *reprinted* in III THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, at 3814 (Francis Newton Thorpe, ed., 1906, Government Printing Office 1909).

The necessity that civil judgments be based solely upon evidence presented is such a fundamental principle, the recurrence to which is sought.

III. The Decision of the Appellate Court on Retaliatory Discharge Conflicts with the Holding in Reeves v. Sanderson Plumbing Products, Inc. The Fourth Circuit held that evidence sufficient to prove Burns prima facie case of retaliation was insufficient to prove her claim of retaliation on the merits. App. 30a. Citing its authority in Williams v. Cerberonics, 871 F2d 452 (4th Cir. 1989), the Fourth Circuit stated that as proof of a prima facie case a plaintiff may demonstrate the casual relation between

the exercise of the protected right and the adverse employment action through evidence of the temporal relationship between the date of plaintiff's termination and the date of employer's knowledge of the filing of a discrimination charge and noted that the passage of time in Burns' case was only two weeks longer than the time held sufficient to demonstrate prima facie causation in Cerberonics. The appellate court concluded, however, that the district court had not ruled upon the sufficiency of a prima facie case of retaliation, rather it had ruled on the merits.

This distinction between the Fourth Circuit's view of Burns' prima facie case contrasted with its view of her case on the merits, where the review is of a judgment granted at the close of Burns' case-in-chief confirms that its review applied the Fourth Circuit standard in Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995) requiring affirmative direct evidence of discrimination. The appellate court expressly declined to consider "the evidence establishing the plaintiff's prima facie case and the inferences properly drawn therefrom" when considering Burns' case on the merits contrary to Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 147 L. Ed. 2d 105; 68 U.S.L.W. 4480 (2220). This reasoning is in direct conflict with this Court's opinion in Reeves stating that a plaintiff's prima facie case, combined with sufficient evidence to find that the employers asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discrimination.

IV. The District Court Abused its Discretion by Failing to Grant Burns' Motion for a Jury Trial. Burns' complaint omitted a request for jury trial and accordingly Burns filed a

Motion for Jury Trial pursuant to FED. R. CIV. P. 39(b). The district court denied Burns' Motion for Jury Trial, ruling that although the factors cited by Burns in accordance with local authority may have supported the award of a jury trial that the sanctity of FED. R. CIV. P. 38 required that the motion be denied. App. 94a-95a.

Such a ruling has the effect of nullifying FED. R. CIV. P. 39(b) and is therefore an abuse of discretion. No motion could be made for a jury trial pursuant to the provisions of FED. R. CIV. P. 39(b) unless there had been a failure to demand a jury pursuant to FED. R. CIV. P. 38. The second sentence of FED. R. CIV. P. 39(b) is subject to no interpretation other than that its intent is to grant authority to the district court, in the exercise of its sound discretion, to relieve a party from a failure to demand a jury trial pursuant to FED. R. CIV. P. 38 and to order a trial by jury notwithstanding the party's failure to have made the demand. The Federal Rules of Civil Procedure are to be interpreted in accordance with their plain meaning. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, (1991). Where the determining factor relied upon in denying a jury request pursuant to FED. R. CIV. P. 39(b) is the maintenance of the integrity of FED. R. CIV. P. 38, the ruling simultaneously undermines the integrity of FED. R. CIV. P. 39(b) by establishing a standard which renders the rule meaningless. As a statute must be construed to support, rather than to defeat it, the same reasoning must apply to the interpretation of the Rule. Crowell v. Benson, 285 U.S. 22, 46, (1932). By granting the discretion to allow a jury trial when none has previously been demanded, the

Rule contains the necessary implication that there are circumstances when FED. R. CIV. P. 38 is not complied with that relief should be granted pursuant to FED. R. CIV. P. 39(b). The rule obligated the district court to determine whether Burns fell within such circumstances. The failure to make that determination is error. The appellate court approved the process and the standard. App. 32a. The factors which the district court considered exclusive of the integrity of the rules weighed in favor of the grant of a jury trial and accordingly, it was an abuse of discretion to deny Burns' motion.

CONCLUSION

Burns acknowledges the admonition in Sup. Ct. R. 10 pertaining to erroneous factual findings. The case at bar, however, submits an egregious departure from all commonly accepted notions of the proper role of the judiciary in the fact finding process and calls for the Court's exercise of its supervisory power. Sup. Ct. R. 10(a). The very essence of the judicial function is factual resolution based upon reliable information presented . Within the context of this function it is the height of caprice to make the resolution on information not presented and constitutes a deprivation of an elemental and fundamental principle of justice recognized both at common law and in all enlightened judicial codes preceding common law. Hyperbole of litigants and their counsel are a common occurrence as demonstrated in the proposed findings of fact submitted by the respondents in advance of trial at the district court. It is not,

however, hyperbole which bring this case to the attention of the Court. The factual discrepancies cited to the lower courts and ignored are as absent from the record as is the equator from the poles; the course of determining that absence, unfortunately requires the tedious task of an examination of all of the trial testimony which has been provided in the appendix.

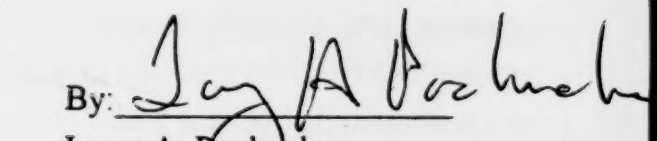
The Court is urged to reaffirm that FED. R. CIV. P. 52 has meaning and requires a district court to arrive at is own conclusions from the evidence presented. The Court is requested to pronounce that review under the "clearly erroneous" standard requires the appellate court to review the entire trial record, not merely in search of support for the district court's findings, but also to determine whether there exists within the record grounds for that which the appealing party alleges and to determine ultimately whether the fact finding process has been principled.

Burns submits that she has proved sex discrimination under the principles set forth in Burlington Indus, Inc. v. Ellerth, 524 U.S. 742 (1998); retaliatory discharge under the principles set forth in Reeves and that SCCI and UniNet constituted a single employer under the principles of Johnson v. Flowers Industry, Inc., 814 F.2d 978 (4th Cir. 1987). Space does not permit recitation of the facts in conjunction with legal authority on those issues other than that already provided. These issues warrant full consideration and will be addressed, given the opportunity, upon the grant of this petition. The failure to exercise discretion pursuant to FED. R. CIV. P. 39(b) and the standards applicable to

such a motion have not previously been addressed by the Court. For all of the foregoing reasons it is respectfully requested that a writ of certiorari be granted.

Respectfully submitted,

PATRICIA B. BURNS

By: 

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No. _____

In The Supreme Court of the United States

PATRICIA B. BURNS,

Petitioner,

v.

UNINET, INCORPORATED, and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,

Respondents.

ON PETITION FOR *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX (VOLUME I OF II) TO PETITION FOR *WRIT* OF *CERTIORARI*

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
	)	CIVIL ACTION NO: 98-0382-A
	)	
UNINET, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that this case is DISMISSED.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
	)	CIVIL ACTION NO: 98-0382-A
	)	
UNINET, INC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case came before the Court for trial without a jury. At the conclusion of the plaintiffs evidence, the Court granted the defendants, motion for judgment as a matter of law.

Plaintiff, Patricia B. Burns ("Burns"), was employed by UniNet from December 1990 through August 24, 1992 during her first period of employment (hereinafter "first period of employment") in the Herndon, Virginia office. Burns was employed from October 1993 through March 10, 1995 during her second period of employment, (hereinafter "second period of employment") in UniNet's Frederick, Maryland office. John E. Bjorn ("Bjorn") served as president of UniNet from its inception

in 1990 until September 1995.

Burns has alleged that, during her employment with UniNet, Bjorn was the only individual who sexually harassed her, discriminated against her or retaliated against her.

After Burns started her employment, she attended sales calls with Bjorn. Although Todd Heidelberger ("Heidelberger") was Burns' direct supervisor, Bjorn had regular involvement with Burns' sales accounts for UniNet. Bjorn also assisted Burns with training and sales calls and observed her performance. Bjorn, with respect to Burns' training, provided sales assistance, evaluated her performance, and treated her the same as other sales representatives.

During Burns' employment with UniNet, both men and women were promoted, placed on probation, and discharged for cause. Most of the sales representatives during each of Burns' two period of employment with UniNet were women, including one of Burns' managers during her second period of employment, Pam Edelman. Burns, herself, was promoted to senior sales representative in December 1991.

During the latter part of Burns, first period of employment, she began failing or refusing to make cold calls to increase UniNet's customer base. She also failed and/or inadequately and untimely prepared Return Merchandise Authorization Forms ("RMAs") to document returned equipment for credit, causing

UniNet to lose money. Bjorn criticized and counseled Burns and others for these acts. Burns, however, did not adhere to Bjorn's directions. Instead, Burns started complaining that UniNet was delaying shipment orders for customers designated to her.

Burns never complained of sexual harassment, gender discrimination, or retaliation during her first period of employment with UniNet. The only complaint Burns made during her first period of employment was in approximately June 1992 to her supervisor, Heidelberger. Burns complained to Heidelberger that Bjorn was treating her harshly, that her sales were not being prioritized, that her clients were being pushed to the side, and that she was being "mistreated."

When she met with Heidelberqer in June 1992, Burns informed him that "I feel like I'm being abused or harassed." Heidelberger asked Burns: "do you feel you are being sexually harassed?" Burns responded: "no, more emotional harassment."

Heidelberger reported to Bjorn that Burns was complaining about company policies. Bjorn met with Burns to discuss her concerns regarding prioritization of sales orders. During this meeting with Bjorn, Burns did not tell Bjorn that she believed that she was being sexually harassed or discriminated against or that she was being treated differently because of her gender.

Burns wrote a follow-up memorandum to Heidelberger

after her meeting with Bjorn that summarized the business issues she and Bjorn discussed. Burns did not mention harassment, nor did she claim that she was singled out because of her gender.

Burns voluntarily- resigned her employment with UniNet in August 1992.

The only unwelcome conduct Burns alleges Bjorn committed during the first period of employment is the following:

- paying more attention to Burns then other women in the office;
- talking about personal, non-business topics with Burns;
- talking about his marital situation with Burns; laughing and joking around Burns; hanging around Burns, desk "all the time"; and
- gazing at Burns' legs when he approached Burns to talk with her.

Plaintiff presented no evidence that Bjorn asked her for sex or for a date. Bjorn never touched Burns, except for one occasion in 1991 during a sales call when Bjorn put his hand behind Burns' back to guide her while they were crossing a busy street in the District of Columbia. Bjorn removed his arm from Burns once they reached the curb on the other side. Bjorn never touched any private part of Burns, never kissed Burns and never attempted to kiss her or hold her hand. Additionally, Bjorn never made any comments of a sexual nature or comments regarding body parts to

Burns.

On one occasion in early 1991, both Burns and Bjorn attended a happy hour. Although several UniNet employees were invited by others to attend the after-work happy hour, no other UniNet employees attended. Both Burns and Bjorn had drinks and discussed business and personal (non-sexual) issues. After finishing their drinks, Burns and Bjorn each departed from the restaurant alone.

An employee in the Herndon office of UniNet, Maureen Kearns testified she initiated personal conversations with Bjorn. Bjorn, however, did not spend a disproportionate amount of time around her, nor did he take any action to initiate a sexual relationship with her.

Another employee, Susan Foreman Temple, testified she leaned into Bjorn's car in a parking lot and kissed him after Bjorn and Temple had been drinking heavily after work. Bjorn never asked Temple for sex, never asked Temple out on a date, and he did not engage in any unwelcome conduct toward her. Temple testified Bjorn never touched her in an unwelcome manner.

Neither Kearns nor Temple ever complained during her respective employment that she was sexually harassed by Bjorn, or that any of Bjorn's conduct was unwelcome. No woman employed at UniNet complained that she was sexually harassed by Bjorn or that she suffered any unwelcome sexual conduct by

Bjorn.

On October 24, 1993, Burns was rehired by UniNet as a senior sales representative and assigned to the Frederick, Maryland office of UniNet.

By memorandum dated June 27, 1994, UniNet sales representatives were informed that the purchasing office would no longer accept orders with a required delivery date of less than five business days. Additionally, sales representatives were informed that there would be no exceptions to this purchasing policy and that any special orders required approval by a sales manager.

Burns immediately challenged this new purchasing policy. By memorandum dated June 29, 1994, Burns openly questioned the new policy and complained that the new policy would result in lost revenue for UniNet and lost income for Burns.

By memorandum dated June 30, 1994, Burns sought an exception to the 60 day policy requiring the buyer to pay within "60 days" for an order placed by Loudoun Hospital. By memorandum dated December 9, 1994, Burns sought an exception to the 60 day policy for another order placed by Loudoun Hospital. On numerous occasions, Burns complained about the 60 day policy, the five day rule, and sought exceptions to the established purchasing policies for orders placed by her customers.

At the end of the initial six month period, Burns requested that her base salary of $25, 000 be continued an additional six months. Burns requested the extension of enhanced salary from Chairman Harris in violation of UniNet's chain of command. Burns did not address the salary extension with her immediate supervisor or with Bjorn. UniNet, through Bjorn, granted Burns' request for an extension of her base salary.

Bjorn and the sales managers, Heidelberger, Gavitt and Lyons, divided up UniNet's sales territory around the Frederick and Herndon offices. The Herndon office included Virginia and the District of Columbia. The Frederick office, where Burns was employed, divided Maryland. Burns was aware of the division when she became re-employed. Despite the knowledge, Burns continued to attempt to call on customers in D.C. and refused to accept the division prescribed by management.

UniNet hired additional sales help in Frederick (Michael McLane and Allen Shirey), and divided the Frederick territory around the sales representatives in accordance with their wishes. Burns demanded the most lucrative territory in Maryland (Rockville), leaving the other sales representatives with little or no productive territory. Burns further complained whenever another sales representative contacted a potential new customer in her territory. However, Burns did little or no cold calling herself to increase the amount of customers in her territory.

After Heidelberger resigned in March 1994, Bjorn invited

Burns to apply and interview for the position of Frederick Branch Manager. Burns declined to apply for the branch manager position. Burns did, however, request management to assign her to the Loudoun Hospital account, which she had handled during her first period of employment in the Herndon, Virginia office. The Loudoun Hospital account was a large UniNet sales account. Loudoun Hospital was also a slow payer that consistently allowed its invoices to remain unpaid for more than 60 days and often more than 90 days. UniNet granted Burns' request and assigned her the Loudoun Hospital account, even though that account should have been assigned to sales personnel in UniNet's Herndon office.

In her April 15, 1994 memorandum to Bjorn seeking an extension of her enhanced base salary, Burns alternatively requested a transfer to the Herndon, Virginia office. If her request had been granted, Burns would have worked in close proximity to Bjorn at Herndon.

Immediately before her enhanced salary extension expired in September 1994, Burns made a second enhanced salary extension request to her immediate supervisor, Pam Edelman. Claiming that Bjorn had not responded to the request, Burns took her request to Chairman Harris. UniNet denied Burns, second request for an extension in October 1994.

Following UniNet's denial of her second enhanced salary extension request in October 1994, Burns wrote 24 memos

detailing her complaints about UniNet's policies and procedures.

On November 23, 1994, Burns wrote a complaint memo claiming for the first time that she had been subject to "harassment" by Bjorn "over approximately the last six months."

Burns sent her November 23, 1994 memo to Bjorn and copies to SCCI's President. The SCCI President and SCCI's human resources manager, Lorie Morrell, immediately met with Burns to discuss the concerns raised in her memorandum.

During the November 23, 1994 meeting, Burns stated for the first time that the "harassment" alleged in her memorandum related to Bjorn's alleged "flirtations," and her rejection of those "flirtations" during her first period of employment with UniNet years earlier in 1991 and 1992. She did not identify any sexual conduct or "flirtation" that had occurred since UniNet had re-employed her in October 1993.

Five days later, UniNet received Burns' first EEOC charge. Morrell immediately met with Burns. During that meeting, Burns claimed for the first time that Bjorn had engaged in sexual harassment.

After Burns filed her EEOC charge, she intensified her written and verbal complaints about UniNet's policies. Her chief complaints related to delays in the ordering and delivery of products for her customers.

By memorandum dated January 26, 1995, Burns was warned by her immediate supervisor, Pam Edelman, that she, like all sales representatives, was not permitted to call other personnel to check on the status of orders. Burns disregarded this warning and violated this established policy by regularly contacting both Beisemeyer and Mossburg, without sales manager approval or knowledge, to seek exceptions to established purchasing policies. On one occasion, Burns called Beisemeyer so many times to seek approval of a special order that Bjorn instructed Beisemeyer not to accept any more calls from Burns that day so that Beisemeyer could perform her regular purchasing duties.

On February 1, 1995, Lyons placed Burns, McLane, and Shirey on probation for failure to meet sales quotas. After being placed on probation, Burns requested that her probation be reconsidered. UniNet granted Burns' request and removed Burns from probation in February 1995. However, in the notice removing her from probation, Lyons specifically directed, and Burns acknowledged, to cease complaining about UniNet's sales and order policies and to start selling.

On March 9. 1995, Burns left work without notice. She walked out after her supervisor had left the office and claims to have faxed a note to Bjorn and SCCI President, Ed Bjorn, further complaining about decisions and actions of UniNet.

On March 10, 1995, UniNet discharged Burns for failure to perform in accordance with UniNet's Policies, procedures, and

management guidelines.

Quid pro quo sexual harassment occurs when an employer demands sexual favors from an employee in return for a job benefit. See Burlington Indus., Inc., v. Ellerth, 118 S. Ct. 2257, 2264 (1998). This harassment occurs when an employer explicitly or implicitly condition, the receipt of a job benefit or detriment on the employees acceptance or rejection of sexual advances. See Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990).

In the present case, there is no evidence that Bjorn made sexual advances to Burns. Ms. Burns experienced no overt sexual conduct by Bjorn or by any supervisors. Bjorn never asked her on a date, never asked her for sex, never touched her inappropriately, and never made sexual comments to her or anyone else at UniNet. Neither did Bjorn demand sexual favors from Burns in return for a job benefit. No evidence of any demand for sexual favors of any kind exists in this case. Therefore, the receipt of a job benefit or a tangible job detriment was never conditioned upon Burns' acceptance or rejection of sexual advances. Reinhold Commonwealth of Virginia, 135 F.3d at 931.

To establish a claim for hostile work environment sexual harassment, a plaintiff must prove (1) that she was harassed because of her sex; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. See Wrightson v. Pizza Hut of

America, Inc., 99 F.3d 138, 142 (4th Cir. 1996); Spicer v. Commonwealth of Virginia, 66 F.3d 705, 710 (4th Cir. 1995).

Burns must prove an essential element of causation: the harassment or other conduct allegedly occurred because of her gender. See Tietgen v. Brown's Westminister Motors, Inc., 921 F. Supp. 1495, 1501 (E.D. Va. 1996). Harassing conduct that is sexually neutral or, at most, ambiguous, is not within the reach of Title VII, Tietgen, 921 F. Supp. at 1500-01, quoting Hopkins Baltimore Gag & Elec. Co., 77 F. 3d 745, 7S3 (4th Cir. 1996). Burns has failed to offer any evidence that the conduct of Bjorn or any other action of UniNet or SCCI occurred because of her gender. The conduct complained of; paying attention to Burns, discussing personal matters with Burns, providing sales assistance to Burns, asking Burns to attend office happy hours, joking around with Burns, discussing his marriage with Burns and alleging retaliation against Burns; is sexually neutral or, at most, ambiguous. See e.g., Hopkins, 77 F.3d at 753 (causation element not satisfied by supervisor who stares at employee in bathroom, kisses employee at receiving line at his wedding and bumps into employee). Burns has failed to prove that UniNet or SCCI took any action or retaliated against her or harassed her because of her gender. There is no evidence that any of the business policy or practices of UniNet were created, administrated or enforced with respect to Burns because of her gender.

For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of

employment and create an abusive working environments See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); Hopkins, 77 F.3d at 753. Relief is unavailable where the alleged conduct is not severe or pervasive enough to create an objectively hostile or abusive work environment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

Accordingly, courts have confirmed the scope of actionable conduct to be that which is so objectively offensive as to alter the conditions of the plaintiff's employment. See e.g., Hartsell v. Duplex Products. Inc.,123 F.3d 766 (4th Cir. 1997) (insensitive and demeaning comments by supervisor did not establish a secure or pervasive environment). In assessing whether the work environment rises to the level of "severe and pervasive," a court must look to the totality of the circumstances, including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance.

Beardsly v. Webt, 30 F.3d 524, 529 (4th Cir. 1994), quoting Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993). Further, the court may not view the behavior in a vacuum, but must give "careful consideration. of the social context in which the particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1003 (1998)

(recognizing that a coach's patting the behind of a football player is difference than an office setting).

Burns alleges that Bjorn harassed her because of her gender by asking her to attend after work office happy hours which other employees were invited to attend, by flirting with her, and by retaliating against her when she allegedly rejected the flirtation. Such conduct does not create an environment that a reasonable person would find hostile or abusive. Moreover, there is no evidence that Burns gave any indication that the conduct was unwelcome.

Burns, claim of hostile environment sexual harassment also relates to the business policies and practices of UniNet. Burns claims that UniNet promulgated, administered and enforced some of its sales, ordering and shipping policies and practices to her detriment because of her gender. The evidence presented, however, shows that the sales and shipping policies and practices of UniNet were legitimate business policies and practices and defendants have articulated legitimate business reasons for their promulgation, administration and enforcement.

To prove her claim of retaliation, Burns must show that (1) she engaged in a protected activity, such as filing a complaint with the EEOC; (2) UniNet acted adversely against her; and (3) the protected activity was causally connected to UniNet's adverse action. See Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994). Burns has demonstrated that she has met the two elements of

proof; she filed an EEOC charge, and UniNet discharged her. However, Burns has offered no evidence to support the third element of her retaliation claim, that there is any causal connection between UniNet's adverse action and her filing a complaint with the EEOC.

Where no other evidence supports a finding of retaliatory motive, the temporal proximity between the discovery of an EEOC charge and an employee's termination is insufficient to show a causal connection. See Mathis v. Perry, 996 F. Supp. 503 (E.D. Va.1997), citing Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986) (finding that plaintiff's discharge four months after filing discrimination claim did not support inference of retaliation). Because Burns has not offered any evidence of retaliatory motive, her claim of retaliation fails.

Burns has also claimed that SCCI is liable because it is a single employer within UniNet. For SCCI to be liable for the claims alleged in the complaint, Burns must present sufficient evidence that SCCI was her employer. SCCI was not Burns, employer because it did not "control the [UniNet's] employment decisions or so completely dominate [UniNet] that the two corporations are the same entity." See Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987). The Court will peer behind the corporate veil "only in extraordinary circumstances" and only if the parent dominates the subsidiary "to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of

the dominant corporation." Johnson, 814 F.2d at 981, quoting Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973). Under this authority, Burns must produce admissible evidence to establish that SCCI was her employer. Burns fails to satisfy this burden.

An appropriate Order shall issue.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 29, 1999

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA B. BURNS,
Plaintiff-Appellant,
V.
UNINET, INCORPORATED;
SOUTHEASTERN COMPUTER
CONSULTANTS, INCORPORATED,
Defendants-Appellees,
and
JOHN E. BJORN,
Defendant.

No. 99-1264

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-98-382)

Argued: January 24, 2000
Decided: April 5, 2000

Before NIEMEYER, Circuit Judge,
Deborah K. CHASANOW, United States District Judge
for the District of Maryland, sitting by designation,

and Andre M. DAVIS, United States District Judge
for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Larry A. Pochucha, COATES & DAVENPORT, Richmond, Virginia, for Appellant. Stephen Michael Silvestri, MILES & STOCKBRIDGE, P.C., Baltimore, Maryland, for Appellees. **ON BRIEF**: David J. Ervin, MILES & STOCKBRIDGE, P.C., McLean, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant, Patricia B. Burns, appeals from a judgment of dismissal entered at the close of the plaintiff's case in an employment discrimination action tried to the court without a jury. We affirm.

I

Burns filed a complaint asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.;* she alleged sexual harassment employment discrimination, disparate treatment employment discrimination on the basis of sex, and retaliation. She did not request a jury trial. Named as defendants were UniNet, Inc., its president John E. Bjorn, and an affiliated entity, Southeastern Computer Consultants, Inc.

At the conclusion of discovery, defendants moved for summary judgment. Meanwhile, counsel for Burns, having realized that a jury trial had not been requested, filed a motion for jury trial pursuant to Fed. R. Civ. P. 39(b).[1] After a hearing on the motions, the district court granted the motion for summary judgment, in part, dismissing all claims asserted against the individual defendant, Bjorn, as well as the disparate treatment claim. Burns does not challenge these rulings on appeal. The district court denied the motion for summary judgment as to the sexual harassment and retaliation claims. The district court also denied the motion for jury trial.

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[1] Rule 39(b) provides: "Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." Fed.R.Civ.P. 39(b).

The case proceeded to trial before the court without a jury. Burns called six witnesses and testified on her own behalf. She also introduced numerous exhibits. At the close of the plaintiff s case, defendants moved for judgment pursuant to Fed. R. Civ. P. 52(a)[2] and (c).[3] The district court granted the motion. Subsequently, the district court set out its findings of fact and conclusions of law in a written memorandum. This appeal followed.

II

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[2] Rule 52(a) provides as follows in pertinent part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 .... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed.R.Civ.P. 52(a).

[3] Rule 52(c) provides as follows in pertinent part: "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue .... Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule." Fed.R.Civ.P. 52(c).

Appellate review of a judgment rendered in a non-jury trial is circumscribed by the highly deferential "clearly erroneous" standard. See *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985); *Carter v. Ball*, 33 F.3d 450, 457 (4th Cir. 1994) (affirming district court's dismissal of employment discrimination case at the close of plaintiff s case). A trial court's findings of fact will only be disturbed if "'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson, 470* U.S. at 574 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1947)).

III

Burns worked as a salesperson for appellee UniNet, Inc., during two separate periods. Her first tenure began in December 1990 and continued through August 1992, when she resigned voluntarily. UniNet rehired Burns in October 1993. She was discharged from employment in March 1995.

Burns presented evidence that Bjorn, the person she identified as the architect of the alleged hostile environment giving rise to her claims, was a difficult manager for whom to work. He was given to inappropriate and unprofessional outbursts in the workplace. Moreover, several former UniNet employees testified as to his flirtatious behavior. On one occasion, after a group of employees met for "happy hour" after work -- a common occurrence -- he kissed one of his subordinates. When the employee expressed her disapproval of his actions, however, no

further actions of the sort were repeated.

Apart from the evidence of the kissing incident mentioned above and one other incident in which Bjorn offered to have an affair with a female subordinate "if [she] would be interested," neither of which involved Burns, the trial was bereft of evidence of an overtly sexual nature.[4] Counsel for Burns concedes that his theory of the sexual harassment claim in the case was something of a hybrid:

> The sexual harassment of Burns at UniNet cannot be packaged to fit nicely within the framework of either a "quid pro quo" or "hostile work environment" analysis; however, an impartial review of the evidence presented at trial clearly demonstrates that Burns suffered abusive mal-treatment during the course of her employment which adversely effected the conditions of her employment and consequently her ability to achieve the level of performance otherwise obtainable solely and exclusively as a result of her gender.

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[4] On one occasion, after he had separated from his wife, Bjorn complained to Burns that he could not find a woman who could "boil a pot of water." Burns also testified that Bjorn stared at her legs.

Appellant's Brief at 35.[5]

Ultimately, therefore, Burns undertook to prove her sexual harassment claim through proof of the existence of a "pattern" allegedly followed by Bjorn whereby, shortly after a woman in whom he was personally interested started to work at UniNet, he would flirt with and otherwise seek to create a "bond" with her by providing extra assistance and mentoring. Under this theory, if and when such a female subordinate made clear her lack of any romantic interest in Bjorn, then he would turn on her and act purposefully to make her workday unpleasant and to diminish the quality of her work product. On the other hand, there was evidence that one employee, who allegedly submitted to Bjorn's advances, gained promotions and eventually became Bjorn's wife. While expressing skepticism, during trial, as to the persuasiveness of this theory under the circumstances, the district court clearly understood the underlying hypothesis of the sexual harassment claim advanced by Burns. *See* J.A. at 231-34.

Thus, Burns adduced evidence that tended to suggest that while Bjorn was generally "mean" to everybody and was prone to

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[5] The Supreme Court has noted that "quid pro quo and hostile work environment are helpful perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

having "fit[s]" of temper, *see id.* at 262-64, he was especially "emotionally harassing" toward her, *see id.* at 201, after he came to believe she harbored no romantic interest in him. Burns voluntarily terminated her first period of employment with UniNet, in part, because she found Bjorn's treatment of her insufferable.

When Burns rejoined UniNet in 1993, she did so partly in reliance on an assurance from her immediate super-visor that she would work in a newly-opened office in Frederick, Maryland, and would have limited contact with Bjorn. Her supervisor soon departed, however, and she was once again required to have contact with Bjorn.

The sales performance of the staff in the Frederick office declined through the end of 1994 and all of the salespersons in that office, two men and Burns, were put on probation. Burns attributed the deterioration in her performance to purposeful acts of her managers, including Bjorn, to whom she ascribed a sexually discriminatory motive.

In November 1994, Burns filed a charge of discrimination with the Equal Employment Opportunity Commission. Thereafter, according to Burns, new and ever changing operating procedures were put into place, which, again according to Burns, kept the sales staff off balance and in the dark as to what was required. Burns contends that these changes were aimed at her and were animated by UniNet's and Bjorn's retaliatory motives arising from the filing of her EEOC charge.

Finally, by March 1995, Burns was nervous, anxious and barely able to withstand the pressures of the workplace. After receiving a memorandum pointing out some further deficiency in her performance, and despairing over a planned management visit with her major client, she had a "panic attack" and departed the office without permission, leaving behind a memorandum asserting, in part, that she was "unable to perform my duties." UniNet terminated her employment the next day for the reasons set forth in the memorandum of termination, which Burns introduced in evidence.

IV

As to the merits of her discrimination and retaliation claims, fully cognizant of the burden placed upon her by the relevant standard of review, Burns has mounted a frontal attack on the district court's findings of fact. She has parsed the district court's memorandum opinion and has identified what she contends are more than a dozen "factual discrepanc[ies]" that, according to her view of the inferences reasonably arising from the evidence, fatally undermine the district court's ultimate findings and conclusions that she failed to establish by a preponderance of evidence that she was the victim of sexual harassment discrimination or retaliation.

We have closely examined the record and we are constrained to reject Appellant's contention that the district court's critical findings are not rooted in the evidence presented at trial.

The court's findings are based on the evidence and, equally important, the *absence* of evidence. It is clear to us that the district court simply rejected - as it was entitled to do as the fact finder - the host of inferences on which her "pattern of conduct" theory of sexual harassment discrimination claim hinged. Similarly, the district court declined to draw an inference of retaliation on the scant evidence supporting that claim. At bottom, then, the district court's ultimate findings are clear and unequivocal and reflect that the district court simply did not interpret the evidence in the manner Burns hoped it would be interpreted.

A

As to the sexual harassment claim, the district court correctly identified the controlling legal principles. *See* J.A. at 636-40 (discussing, *inter alia, Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); and *Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766 (4th Cir. 1997)). In light of the district court's resort to the correct legal principles, the court's ultimate findings, including its findings that: (1) "no evidence [established] that Bjorn made sexual advances to Burns," J.A. at 636; (2) "Burns experienced no overt sexual conduct by Bjorn or by any supervisors," *id.*; (3) Burns "failed to offer any evidence that the conduct of Bjorn ... occurred because of her gender," *id.* at 637; (4) the actions complained of by Burns were "sexually neutral or, at most, ambiguous," *id.* at 638; and (5) Bjorn's "conduct [did] not create

an environment that a reasonable person would find hostile or abusive," *id.* at 640, are not clearly erroneous. *See Carter*, 33 F.3d at 457 (evaluating the district court's conclusions as to the "factual sufficiency" of the evidence of employment discrimination).[6]

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[6] The Seventh Circuit has observed:

> Although it is beyond dispute that pure questions of law should be reviewed *de novo*, the existence of racial harassment in a hostile work environment involves an application of law (the standards governing the existence of racial harassment and hostile work environment discrimination) to facts (the specific discriminatory conditions alleged by the plaintiff). If the trial judge correctly states the law, then his findings as to whether the facts meet the legal standard will be disturbed only if they are clearly erroneous. Our review would be more searching if the district court has committed an error of law, including one that "infect[s] a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.
>
> Here the district judge properly understood and expressed the current legal standards for finding racial harassment in a hostile work environment. Because he did not misstate, misinterpret or misapply the law, we apply the clear error rule to his findings, for the defendant takes issue with the trial judge's view of the

Our analysis of the record leads to the same conclusion with respect to the retaliation claim. To make out a prima facie case of retaliation under Title VII, 42 U.S.C. § 20OOe-3, a plaintiff must show that (1) the plaintiff engaged in a protected activity, such as filing a complaint with the EEOC; (2) the employer took adverse action against the plaintiff, and (3) the protected activity was causally connected to the employer's adverse action. *Beall v. Abbott Labs., 130* F.3d 614, 619 (4th Cir. 1997). Once this is shown, the burden shifts to the employer to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for the adverse action. *Id.* The plaintiff must then demonstrate that the employer's reason was mere pretext for retaliation by proving "both that the reason was false, and that discrimination was the real reason for the challenged conduct." *Id.* (internal quotation omitted).

A plaintiff may demonstrate the third requirement of a prima facie case - that the protected activity was causally related to the employer's adverse action - by showing "essentially ... that she was fired after her employer became aware that she had filed a discrimination charge." *Williams v. Cerberonics,* 871 F.2d 452,

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evidence, not with his view of the law.

Daniels v. Essex Group, Inc., 937 P.2d 1264, 1269-70 (7th Cir. 1991) (citations omitted). As in *Daniels,* in the case at bar, Burns disagrees with the district court's view of the evidence.

457 (4th Cir. 1989). Such proof, while clearly not conclusive in proving ultimate liability, certainly satisfies the less onerous burden of making a prima facie case of causality." *Id.* (showing that firing occurred three months after filing of discrimination complaint was sufficient to show causation); *see also Carter*, 33 F.3d at 460.

On November 23, 1994, Burns notified Bjorn's superior that she had been sexually harassed by Bjorn. On November 28, 1994, Burns filed a complaint with the EEOC. Three months later, on March 10, 1995, Burns was fired. The passage of time between the filing of her EEOC charge and Appellant's termination was only two weeks longer than the time held sufficient to demonstrate prima facie causation in *Cerberonics*. *See* 871 F.2d at 457.

Nevertheless, in the case at bar, the district court found that Burns "offered no evidence to support the third element of her retaliation claim. . ." J.A. at 640-41.[7] It went on to explain,

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[7] To be sure, one could read the district court's findings on this issue to suggest that the court was focused on the existence *vel non* of a prima facie case of retaliation, rather than on the ultimate question of whether Burns had adduced sufficient evidence to persuade the district court of the existence of UniNet's retaliatory motive for her termination. We are satisfied, however, particularly in light of the district court's reliance on *Carter*, which dealt expressly with a claim of retaliation under identical circumstances, that the district court did not reject the proof as failing to establish a prima facie case, but instead, ruled on the merits of the retali-

however, that where no other evidence supports a finding of retaliatory motive, the temporal proximity between the discovery [by the employer] of an EEOC charge and an employee's termination is insufficient to show a causal connection." *Id.* at 641.

The district court's factual conclusion is wholly consistent with Fourth Circuit authority. In *Cerberonics*, this Court held that "mere knowledge on the part of an employee that an employee it is about to fire has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee." 871 F.2d at 457. Evidentiary support for the existence of UniNet's legitimate nonretaliatory motive in terminating Burns is found in evidence entered by Burns during her case-in-chief. See J.A. at 412; *see generally id.* at 464-512. Thus, even though the record in this case does not "overwhelmingly support[] the trial court's finding of no retaliation," *Cerberonics*, 871 F.2d at 457, the district court nevertheless must be affirmed under the deferential "clearly erroneous" standard of review. "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Zfass v. Commissioner, 118 F.3d, 184, 188 (4th Cir. 1997) (quoting *Anderson*, 470 U.S. at

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ation claim at the close of the plaintiff's case-in-chief, as Fed.R.Civ.P. 52 plainly authorizes.

574).[8]

V

Finally, Burns' counsel candidly admitted fault in failing to make a timely request for jury trial, *see* J.A. at 48-60 ("The frailty of human nature is neither an excuse nor a refuge, but the only accounting available."). He requested the district court to exercise its discretion under Rule 39(b) to empanel a jury. *See Malbon v. Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 940 n.12 (4th Cir. 1980). We discern no abuse of discretion in the district court's denial of the motion.

VI

For the reasons set forth above, the judgment is

AFFIRMED.

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[8] In the view we take of the case, it is unnecessary to consider the issue of whether Southeastern Computer Consultants, Inc., as well as UniNet, was subject to suit under Title VII.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 2, 2000

No. 99-1264
CA-98-382

PATRICIA B. BURNS
Plaintiff - Appellant

V.

UNINET, INCORPORATED; SOUTHEASTERN COMPUTER CONSULTANTS, INCORPORATED
Defendants - Appellee

and

JOHN E. BJORN
Defendant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and reheating en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
UNINET, INC., et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants UniNet, Inc. ("UniNet" or the "Company") and Southeastern Computer Consultants, Inc. ('SCCI"), by their undersigned counsel, and pursuant to Fed. R. Civ. P. 52, hereby submit their Proposed Findings of Fact and Conclusions of Law.

I. PROPOSED FINDINGS OF FACT

A. The Parties

1. UniNet is in the business of developing, maintaining and selling integrated hardware and software

computer systems to businesses and individuals. UniNet is headquartered in Fairfax, Virginia, and has one office in Frederick, Maryland. At all times material to this case, UniNet has had fewer than 50 employees.

2. Plaintiff Patricia B. Burns ("Burns") was employed by UniNet during her first period of employment (hereinafter "First period of employment") from December 1990 through August 24, 1992 in the Herndon, Virginia office and in UniNet's Frederick, Maryland office during her second period of employment (hereinafter "second period of employment") from October 1993 through March 10, 1995.

3. SCCI is a Department of Defense government contractor that performs classified work on U.S. missile and satellite systems. SCCI is headquartered in Frederick, Maryland and has eight offices in five states. At all times material to this case, SCCI has employed fewer than 125 employees.

4. UniNet and SCCI are separate and distinct corporations. UniNet and SCCI have different shareholders (except for Leo Harris), directors, officers and employees; are engaged in separate industries (UniNet is commercial; SCCI exclusively defense contracting); maintain separate corporate records, accounting systems, bank accounts and corporate policies and procedures; file separate tax returns; employ different accountants; maintain different employee benefit programs; and have separate insurance policies. The only regular relationship between the two corporations is that SCCI processes UniNet's payroll and performs data processing and accounting services, as requested, for a fee that is regularly invoiced to and paid by

UniNet. SCCI has also purchased computer hardware and services from UniNet at a non-discounted rate.

5. John E. Bjorn ("Bjorn") is an individual who resides in Maryland and served as president of UniNet from its inception in 1990 until September 1995.

6. During her employment by UniNet, only Bjorn is alleged by Burns to have sexually harassed her, discriminated against her and retaliated against her.

7. Most of the sales representatives during each of Burns' two periods of employment with UniNet were women.

8. One of Burns' managers during her second period of employment, Pam Edelman is a woman.

9. UniNet has an equal employment opportunity policy, contained in its Employee Handbook, that prohibits sexual harassment and discrimination. See UniNet Corp. Policy No. II 2 (Defendants' Trial Exhibit 4)[1].

10. The UniNet Employee Handbook, which contains Corporate Policy No. 112, was given to Burns. Burns admits that she kept her copy of the Employee Handbook in her desk.

11. UniNet's 'Prevention of Sexual Harassment Policy" was implemented on February 5, 1993. The Policy encourages employees to report any harassment immediately to their supervisor, provides for remedial action by supervisors and unequivocally states that '[r]etaliatory action against the harassed will not be tolerated."

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[1] All references to Defendants' Joint Trial Exhibits will be abbreviated as "Def. Exhibit."

B. Burns' First Period of Employment

12. After she started her employment, Burns attended sales calls with Bjorn and Bjorn had regular involvement with Burns' sales accounts for UniNet, although Todd Heidelberger ("Heidelberger") was Burns' direct supervisor. Bjorn also assisted Burns with training and sales calls and observed her performance. With respect to her training, and on providing sales assistance for and evaluating the performance of Burns, Bjorn treated Burns the same as other sales representatives.

13. During Burns' employment with UniNet, both men and women were promoted, placed on probation, and discharged for cause.

14. Burns was promoted to senior sales representative in December 1991.

15. Burns never complained of sexual harassment, gender discrimination, or retaliation during her first period of employment with UniNet.

16. During the latter part of her first period of employment, Burns began failing or refusing to make cold calls to increase UniNet's customer base. She also failed and/or inadequately and untimely prepared Return Merchandize Authorization Forms ("RMAs") to document returned equipment for credit, which caused UniNet to lose money. Bjorn criticized and counseled Burns and others for these acts. Burns did not adhere to Bjorn's directions. Instead, she started complaining that UniNet was delaying the shipment of orders for customers designated for her. Bjorn also criticized other male and female sales representatives for not cold calling and for failing to fill out

RMAs correctly and timely.

17. Before the latter part of the first period of employment, Burns' sales were dropping.

18. Heidelberger also reported to Bjorn that Burns was complaining about company policies. Bjorn met with Burns to discuss her concerns regarding prioritization of sales orders. Burns did not tell Bjorn during this meeting that she believed that she was being sexually harassed or discriminated against or that she was being treated differently because of her gender.

19. The only complaint Burns made during her first period of employment was in approximately June 1992 to her supervisor, Heidelberger. Burns complained to Heidelberger that Bjorn was treating her harshly, that her sales were not being prioritized, that her clients were being pushed to the side, and that she was being 'mistreated.'

20. When she met with her supervisor in June 1992, Burns informed Heidelberger that "I feel like I'm being abused or harassed." Heidelberger asked Burns: "do you feel you are being sexually harassed?" Burns responded "no, more emotional harassment."

21. Bjorn treated men and women the same when enforcing UniNet policies and procedures.

22. A UniNet senior technician, Trung Le ("Le"), prepared all received orders for shipment to UniNet customers. At no time did Le receive any instructions by Bjorn or anyone else to delay, hold back, or place Burns' orders in a secondary position. Le treated Burns' orders the same as orders for all other sales representatives.

23. Burns wrote a follow-up memorandum to Heidelberger after her meeting with Bjorn that summarizes the business issues they discussed. She did not mention harassment, Def Exhibit 16, and Burns did not claim that she was singled out because of her gender.

24. Burns voluntarily resigned her employment with UniNet in August 1992. Def. Exhibit 35.

25. Burns stated to Bjorn and UniNet's Chairman Harris at the time of her voluntary departure in August 1992 that she was leaving to pursue a business venture with her then fiancee David Cook. Burns concealed her complaints about Bjorn from Bjorn and Harris.

26. During the period from August 1992 to October 1993, Burns visited UniNet to deliver printing products and services, which UniNet purchased from her fiancee's business. Bjorn approved the purchase of printing products and printing services from Burns fiancee's business. During this time, Burns did not complain about Bjorn, and Bjorn did not engage in any solicitation of Burns for a relationship, sexual or otherwise.

27. The only unwelcome conduct Burns alleges Bjorn committed during the first period of employment is the following non-sexual, harmless conduct:

- paying more attention to Burns then other women in the office;
- talking about personal, non-business topics with Burns;
- talking about his marital situation with Burns;
- laughing and joking around with Burns;

- hanging around Burns' desk "all the time"; and
- gazing at Burns' legs when he approached Burns to talk with her.

Bjorn did not engage in any of this conduct.

28. Bjorn did not ask Burns for sex or a date.

29. Bjorn never touched Burns except for one occasion in 1991 during a sales call when Bjorn put his hand behind Burns' back to guide her while they were crossing a busy street in the District of Columbia, removing his arm once they reached the curb on the other side. Bjorn never touched any private part of Burns. Bjorn never kissed Burns or attempted to kiss her or hold her hand, and he never made any comments of a sexual nature or comments regarding body parts to Burns.

30. During Burns' first period of employment with UniNet, groups of UniNet employees occasionally gathered after work for happy hour at a local restaurant. Bjorn rarely attended such happy hours and seldom asked other employees to attend.

31. On one occasion in early 1991, both Burns and Bjorn attended a happy hour. Although several UniNet employees were invited by others to attend the after-work happy hour, no other UniNet employees attended. Both Burns and Bjorn had drinks and discussed business and personal (non-sexual) issues. After finishing their drinks, Burns and Bjorn each departed from the restaurant alone.

32. Bjorn never made any sexual comments to Burns or comments to any person that he and Burns were having an affair. Burns never indicated that any of Bjorn's conduct toward her was unwelcome.

33. Another employee in the Herndon office of UniNet, Maureen Kearns ("Kearns"), initiated personal conversations with Bjorn. Bjorn did not spend a disproportionate amount of time around Kearns or take any action to initiate a sexual relationship with her.

34. Another employee, Susan Foreman Temple ("Temple"), leaned into Bjorn's car in a parking lot and kissed him after Bjorn and Temple had been drinking heavily after work. Bjorn never asked Temple for sex and never asked Temple out on a date, and he did not engage in any unwelcome conduct toward her.

35. Bjorn never touched Temple in an unwelcome manner.

36. Neither Kearns nor Temple ever complained during her respective employment that she was sexually harassed by Bjorn, or that any of Bjorn's conduct was unwelcome.

37. Other than Burns, no woman employed at UniNet complained that she was sexually harassed by Bjorn or that she suffered any unwelcome sexual conduct by Bjorn.

C. Burns' Second Period of Employment

38. Fourteen months later, in October 1993, Burns voluntarily expressed interest in returning to work for UniNet to Todd Heidelberger.

39. On October 24, 1993, Burns was rehired by UniNet as a senior sales representative and assigned to the Frederick, Maryland office of UniNet.

40. During the period prior to Burns' reemployment, Bjorn hired Nancy Mossburg as UniNet's accountant, and shortly

thereafter Karen Biesemeyer as UniNet's purchasing agent. Because sales were growing, UniNet needed professional administrative help with cash flow and equipment order problems. Bjorn, Mossburg and Biesemeyer centralized the ordering process. Prior to Biesemeyer's hire, all sales representatives placed their orders for new equipment directly with vendors. As sales grew, the unconsolidated ordering became confusing and difficult to maintain profitably. After Biesemeyer was hired, all UniNet sales representatives were prohibited from placing orders for equipment with vendors. The sales representatives were directed to transmit orders to Biesemeyer for consolidation and placement with vendors.

41. By memorandum dated June 27, 1994, (Def. Exhibit 41), sales representatives were informed that purchasing would no longer accept orders with a required delivery date of less than five business days. Additionally, sales representatives were informed that there would be no exceptions to this purchasing policy and that any special orders required approval by a sales manager.

42. Burns immediately challenged this new purchasing policy. By memorandum dated June 29, 1994, Burns openly questioned the new policy and complained that the new policy would result in lost revenue for UniNet and lost income for Burns. Def Exhibit 16.

43. Burns challenged UniNet's established purchasing policies and frequently sought exceptions to the policies for her orders. By memorandum dated June 30, 1994, Burns sought an exception to the 60 day policy for an order placed by Loudoun

Hospital. Def Exhibit 16. By memorandum dated December 9, 1994, Burns sought an exception to the 60 day policy for another order placed by Loudoun Hospital. Id. Burns complained about the 60 day policy, the five day rule, and sought exceptions to the established purchasing policies for orders placed by Loudoun Hospital, Mnemonic Systems and Trans Tech in her memoranda dated January 13, 1995; January 16, 1995 (2 memos); January 18, 1995; January 20, 1995 (3 memos); January 24, 1995; and March 7, 1995. Id. Burns' challenges to these policies became more frequent, open and defiant as her employment progressed.

44. During the entire second period of employment of Burns, UniNet experienced cash flow difficulties. It had trouble paying for equipment it ordered as a result of orders placed with UniNet by its customers. Occasionally, vendors held orders for UniNet's equipment until UniNet paid current balances. On a daily basis, Biesemeyer obtained information from sales managers Donna Gavitt, Todd Heidelberger and John Lyons as to those UniNet customers who needed orders shipped immediately, and Mossburg released funds to vendors so that such equipment could be shipped.

45. At no time did Bjorn direct that Burns be singled out for unfavorable treatment in the ordering or delivery process. Neither Mossburg nor Biesemeyer held up orders for Burns' customers, and Mossburg treated Burns and customers assigned to Burns the same as other sales representatives.

46. At the end of the initial six month period, Burns requested that her base salary of $25,000 be continued an additional six months. Def. Exhibit 16. Burns requested the

extension of enhanced salary from Chairman Harris in violation of UniNet's chain of command. Burns did not address the salary extension with her immediate supervisor or with Bjorn.

47. UniNet, through Bjorn, granted Burns' request for an extension of her base salary.

48. Burns reported to Todd Heidelberger in October 1993. Heidelberger continued as Burns' immediate supervisor until his departure from the company in March 1994. Prior to March 1994, Bjorn had little direct contact with Burns, except for sales meetings.

49. Bjorn and the sales managers, Heidelberger, Gavitt and Lyons, divided up UniNet's sales territory around the Frederick and Herndon offices. The Herndon office included Virginia and the District of Columbia. The Frederick office divided Maryland. Burns was aware of the division when she became reemployed. Despite the knowledge, Burns continued to attempt to call on customers in D.C. and refused to accept the division prescribed by management.

50. UniNet hired additional sales help in Frederick (Michael McLane and Allen Shirey) and it divided the Frederick territory around the sales representatives in accordance with their wishes. Burns demanded the most lucrative territory in Maryland (Rockville), leaving the other sales representatives with little or no productive territory. Burns further complained whenever another sales representative contacted a potential new customer in her territory. However, she did little or no cold calling herself to increase the amount of customers in her territory.

51. After Heidelberger resigned in March 1994, Bjorn

invited Burns to apply and interview for the position of Frederick Branch Manager.

52. Burns declined to apply for the branch manager position and Bjorn hired Pam Edelman, a female, to fill the position. Thereafter, Burns reported directly to Edelman.

53. When Heidelberger left UniNet in March 1994, Burns requested management to assign her to the Loudoun Hospital account, which she had handled during her first period of employment in the Herndon, Virginia office.

54. The Loudoun Hospital account was a large UniNet sales account. Loudoun Hospital was also a slow payer that consistently allowed its invoices to remain unpaid for more than 60 days and often more than 90 days.

55. UniNet granted Burns' request and assigned her the Loudoun Hospital account, even though that account should have been assigned to sales personnel in UniNet's Herndon office.

56. UniNet and Bjorn extended special benefits and opportunities to Burns during her second period of employment with UniNet, including:

A. Burns requested and was granted enhanced base salary for one year;

B. Burns requested and was granted an exception from UniNet's standard "90 Day Rule" in May and June 1994 so that additional commissions could be earned by Burns on accounts that were more than 90 days past due; and

C. Burns requested and was granted an exception from UniNet's standard "60 Day Rule' in January 1995 so that sales orders for her customers were processed even if those

customers' accounts were 60 days past due.

57. In her April 15, 1994 memorandum to Bjorn seeking an extension of her enhanced base salary, Burns alternatively requested a transfer to the Herndon, Virginia office. If her request had been granted, Burns would have worked in close proximity to Bjorn at Herndon.

58. Immediately before her enhanced salary extension expired in September 1994, Burns made a second enhanced salary extension request to her immediate supervisor, Pam Edelman. Claiming that Bjorn had not responded to the request, Burns took her request to Chairman Harris. UniNet denied Burns' second request for an extension in October 1994.

59. Long before filing her EEOC: charge in November 1994, Burns began complaining about UniNet policies and procedures both verbally and in writing through a series of memos. Def Exhibit 16. Burns most frequently complained that she and other sales representatives were prohibited from calling Biesemeyer and Mossburg to lobby for orders and speed up shipping. Biesemeyer and Mossburg had directed that sales representatives contact them through their managers to reduce the amount of time spent dealing with requests for information. This direction applied to all sales representatives, not just Burns. Burns, however, refused to accept this and intensified her complaints.

60. Following UniNet's denial of her second enhanced salary extension request in October 1994, Burns wrote 24 memos detailing her complaints about UniNet's policies and procedures. Def. Exhibit 12.

61. On November 18, 1994, Bjorn attended a monthly sales meeting in the Frederick office with Pam Edelman. After the meeting, Burns, and the other Frederick sales representatives, Mike McLane and Allen Shirey, requested to meet with Bjorn. Burns attempted to bait Bjorn during the meeting to get him to state that he was unfair to the Frederick office. Burns chose this meeting to air her many complaints and to challenge the policies Bjorn, Biesemeyer and Mossburg had put into place. She was openly critical of Bjorn. None of her complaints related to harassment or gender discrimination. Burns tape-recorded the meeting without Bjorn's knowledge or consent. Burns testified during her deposition that she later destroyed the tape.

62. At the meeting, Burns contended that many Frederick office sales orders were being placed behind Herndon office sales orders, causing delays in delivery of products to Frederick office customers.

63. After the November 18, 1994 meeting in the Frederick office, Bjorn promptly performed a comparative study of sales orders placed by sales representatives in the Frederick and Herndon offices of UniNet. Def. Exhibit 27.

64. The results of Bjorn's informal study show that there was a one-day difference between Frederick and Herndon in terms of the average number of days for a product to be shipped from a vendor. The same time frame applied to all sales employees working in Frederick, including Burns.

65. When her complaints about shipping and order policies were rejected by Bjorn and/or demonstrated to be groundless, Burns escalated her complaints by focusing on Bjorn

instead of UniNet's policies and procedures. On November 23, 1994, Burns wrote a complaint memo claiming for the first time that she had been subject to "harassment" by Bjorn "over approximately the last six months." Def. Exhibit 14.

66. Burns' November 23, 1994 memorandum makes no reference to sexual harassment or her rejection of alleged "flirtations" during Burns' first period of employment with UniNet in 1991-92. The memorandum does not allege any retaliatory conduct by Bjorn or that Bjorn was treating Burns differently because of her gender.

67. Burns sent her November 23, 1994 memo to Bjorn and copied SCCI's President, Edward Bjorn. Ed Bjorn and SCCI's human resources manager, Lorie Morrell, immediately met with Burns to discuss the concerns raised in her memorandum. The meeting was attended by Ed Bjorn, Pam Edelman, Lorie Morrell and Burns in SCCI's Frederick office. Harris was unable to attend the meeting due to a scheduling conflict and he requested that Ed Bjorn and Lorie Morrell represent him at the meeting.

68. During the November 23, 1994 meeting, Burns stated for the first time that the "harassment" alleged in her memorandum related to Bjorn's alleged "flirtations" and her rejection of those "flirtations" during her first period of employment with UniNet years earlier in 1991 and 1992. She did not identify any sexual conduct or "flirtation" that had occurred since UniNet had reemployed her in October 1993.

69. At the conclusion of the meeting, Burns was advised to avoid personal contact, except when necessary, with Bjorn. Morrell instructed Bjorn similarly with respect to

communicating with Burns.

70. Harris ultimately asked Morrell to conduct and oversee an investigation of Burns, complaint of harassment to ensure that an objective and impartial investigation of UniNet's president was conducted. Five days later, UniNet received Burns' first EEOC charge. Morrell immediately met with Burns. During that meeting, Burns claimed for the first time that Bjorn had engaged in sexual harassment.

71. After Burns filed her EEOC charge, she intensified her written and verbal complaints about UniNet's policies. Her chief complaints related to delays in the ordering and delivery of products for her customers. During the time period from November 1994 until her March 1995 discharge, she frequently involved UniNet and SCCI personnel who had little to do with the policies. Her complaints interfered with her supervisor's performance of her job, and contributed to the poor management and sales performance of the Frederick office.

72. By memorandum dated January 26, 1995, Burns was warned by her immediate supervisor, Pam Edelman, that she, like all sales representatives, was "not permitted to call Nancy [Mossburg] to check on the status of orders." Def. Exhibit 23. Burns disregarded this warning and violated this established policy by attempting to contact Mossburg to check on the status of her orders.

73. Burns regularly contacted Beisemeyer, without sales manager approval or knowledge, to seek exceptions to established purchasing policies. On one occasion, Burns called Beisemeyer so many times to seek approval of a special order that

Bjorn instructed Beisemeyer not to accept any more calls from Burns that day so that Beisemeyer could perform her regular purchasing duties.

74. By written memorandum dated December 5, 1994, Burns was warned by her immediate supervisor, Pam Edelman, that she was setting unrealistic expectations for customers for delivery of products and that she was mismanaging her time by writing memos and wasting her time. Def. Exhibit 26. Burns' memo writing increased after she received this warning from her supervisor.

75. John Lyons became branch manager of the UniNet Frederick office in December 1994. Lyons redefined the Frederick sales territory because he observed that Burns had been allowed to take the only lucrative territory (1-270 corridor). He allowed Burns to keep a lucrative part of the Rockville projects and gave other 1-270 technical areas to McLane because his previous territories (Hagerstown and Frederick) had little or no businesses located in them. Upon dividing the territory, Lyons allowed all sales representatives to retain customers they already had established, regardless of territory. Burns did not lose any customers because of this division.

76. Throughout the fall of 1994 and early 1995, the sales of the Frederick office were poor. The office was losing money and relied on financial support from the Herndon operations. In addition to directing that more cold calls be made to more businesses, Bjorn also consolidated some shipping and built-out tasks in Herndon where UniNet had more experienced and qualified technical representatives.

77. Bjorn, Edelman, and later Lyons, all warned the sales representatives in Frederick that their sales needed to increase. Burns was instructed by Bjorn to stop complaining about policies and make sales. Bjorn had already counseled Burns that her sales profit margins were the lowest in the company.

78. On February 1, 1995, Lyons placed Burns, McLane, and Shirey on probation for failure to meet sales quotas. Burns had failed to meet her sales quota in 9 out of the preceding 12 months, her margins were very low, and her constant complaining interfered with her ability to sell. In the probation notice, Lyons specifically warned Burns that the complaints against UniNet policies were to cease and that she was to follow UniNet policies. Burns challenged Lyons and threatened to ignore his instructions.

79. After being placed on probation Burns requested that her probation be reconsidered. Burns also requested that a sale processed after the standard 90 day period for calculation of sales quotas be considered processed during the 90 day period.

80. Burns stated in her request for reconsideration of her probation that she was unaware of the cut-off date for the 90 day sales period. In fact, she was aware of that date. In December 1994, Burns specifically confirmed that the cut-off date for the current 90 day sales period was January 31, 1995. Notwithstanding this fact, UniNet granted Burns's request and removed Burns from probation in February 1995. However, in the notice removing her from probation, Lyons specifically directed and Burns acknowledged that she was being told to cease complaining about UniNet's sales and order policies and to start

selling.

81. In addition to the period of written or formal probation, Burns was placed on informal or verbal probation by Chairman Harris. During two separate meetings in January and February 1995, Harris informed Burns that she was at risk of losing her employment. Harris informed Burns that Burns needed to improve in four areas to keep her job; she had to: (1) follow management's guidelines; (2) follow UniNet's policies; (3) get her sales up to what was expected; and (4) be more positive with clients.

82. Despite being warned by Lyons and Harris both verbally and in writing, Burns continued to complain about UniNet policies. She complained that Bjorn was going to visit her chief customer, Loudoun Hospital, despite the fact that she knew Harris had instructed Burns to visit large accounts. When Harris told Burns of that fact and directed that she accept his instructions, Burns continued to complain about it. Burns also complained about an expense deduction from her paycheck shipping a product which she previously said she would pay for personally. When she did not receive payment, she called SCCI personnel out of the chain of command, complained, and demanded payment.

83. On March 9, 1995, Burns left work without notice. She walked out after her supervisor had left the office and claims to have faxed a note to Bjorn and SCCI President, Ed Bjorn, further complaining about decisions and actions of UniNet. Harris reviewed the notice and concluded that Burns had resigned employment. He further decided that if Burns returned to work, she would be discharged because she had disobeyed a continuing

order to abide by UniNet decisions and policies despite repeated warnings.

84. On March 10, 1995, UniNet discharged Burns for failure to perform in accordance with UniNet's policies, procedures, and management guidelines. Def Exhibit 3.

85. UniNet's discharge of Burns was based upon legitimate business reasons.

86. UniNet's discharge of Burns was not based upon any retaliatory or improper motive.

87. Burns' filing of her EEOC charge in November 1994 was not a motivating factor in UniNet's decision to discharge Burns on March 10, 1995.

88. Burns' discharge on March 10, 1995 is the only adverse employment action suffered by Burns.

89. Prior to her discharge from UniNet and continuing through her subsequent employment at Loudoun Computer Services, Burns experienced physiological conditions that regularly affected her stress level and anxiety condition. These physical/physiological conditions were unrelated to her conditions or terms of employment.

90. Following her discharge from UniNet on March 10, 1995, Burns searched for new employment in the computer sales industry. In April-May, 1995 Burns interviewed for sales positions at several computer companies, including Computer Associates, CMS and Altair Associates. Burns turned down an offer of employment from CMS. Burns submitted an oral counteroffer of employment to CMS. Burns' oral counteroffer was rejected by CMS. Altair Associates asked Burns to make a

written proposal on her terms of employment. Burns refused or failed to submit any proposal for her terms of employment with Altair.

91. Burns was hired by Loudoun Computer Services ("Loudoun Computer") in August 1995 as a sales representative. Burns was employed as a sales representative with Loudoun Computer horn August 1995 through December 1997. Burns earned $43,409 in 1994, $33,557 in 1995 ($11,093.15 from UniNet; $22,557.00 from Loudoun Computer), $78,106.00 in 1996 (Loudoun Computer) and $46,141.00 in 1997 (Loudoun Computer).

92. Burns was discharged by Loudoun Computer in December 1997. Burns requested that she be permitted to work from home full time. Loudoun Computer denied her request and required her to return to work. When Burns failed or refused to return to work, Loudoun Computer terminated her employment. Burns request to work from home full-time was unreasonable. Loudoun Computer's refusal to allow Burns to work from home full-time was reasonable.

93. Burns filed a discrimination charge against Loudoun Computer after her discharge in December 1997. She withdrew the charge of discrimination without prejudice.

94. Burns has not sought employment since December 1997. Burns stated reasons for not seeking employment since her discharge in December 1997 include stress, the need to care for her mother and her inability to seek new employment, which she alleges resulted from her work experience at UniNet.

95. Burns claims she is unable to seek employment of

any kind until January 1, 2000.

96. Burns' refusal to seek employment of any kind since December 1997 is unreasonable. Buns has failed to make reasonable efforts to find other suitable employment since December 1997.

97. Burns refused or failed to comply with the terms of her employment with Loudoun Computer in December 1997. Loudoun Computer did not impose unreasonable working conditions on Burns when they required her to report to work on a regular basis. Burns failed to use reasonable diligence to maintain her employment with Loudoun Computer.

II. PROPOSED CONCLUSIONS OF LAW

A. Count I of the Complaint

1. In Count I of her Complaint, Burns claims that Defendants UniNet and SCCI engaged in quid pro quo sexual harassment. Complaint ¶¶ 60-65.

2. Quid pro quo sexual harassment occurs when an employer conditions, explicitly or implicitly, the receipt of a job benefit or tangible job detriment on the employee's acceptance or rejection of sexual advances." Reinhold v. Commonwealth of Virginia, 135 F.3d 920, 931 (4th Cir. 1998), citing Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990) (emphasis added). Bjorn did not make sexual advances to Burns. Burns admits that she experienced no overt sexual conduct by Bjorn or any of her supervisors. Burns admits that Bjorn never asked her on a date, never asked her for sex, never touched her inappropriately, and never made sexual comments to her or anyone else at UniNet. Therefore, the receipt of a job benefit or

a tangible job detriment was never conditioned upon Burns' acceptance or rejection of sexual advances. Reinhold, 135 F.3d at 931.

3. As the Supreme Court recently determined, quid pro quo sexual harassment occurs when an employer demand[s] sexual favors from an employee in return for a job benefit. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2264 (1998) (emphasis added). Bjorn did not demand sexual favors from Burns in return for a job benefit. No evidence of any demand for sexual favors of any kind exists in this case.

4. Burns' own conduct contradicts her allegation that Bjorn made demands for sexual favors in return for a job benefit. Ellerth, 118 S. Ct. at 2264. Despite her general allegations of "flirtations" by Bjorn during her initial period of employment in 1991-92, Burns returned to work for UniNet in October 1993 and twice requested a transfer to the Virginia office where Bjorn worked. Accordingly, Burns has not established by a preponderance of the evidence that Defendants engaged in quid pro quo sexual harassment and Defendants are entitled to judgment under Count 1.

5. To establish a claim for hostile work environment sexual harassment, a plaintiff (1) "must prove that [s]he was harassed 'because' of [her] 'sex'; (2) that tile harassment was unwelcome; 3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer." Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 142 (4th Cir. 1996); Spicer v. Commonwealth of Virginia, 66 F.3d 705,

710 (4th Cir. 1995).[2]

6. Burns must prove an essential element "of causation: the harassment or other conduct allegedly occurred because of the victim's gender." Tietgen v. Brown's Westminster Motors, Inc., 921 F. Supp. 1495, 1501 (E.D. Va. 1996) (emphasis in original). Harassing conduct that is "sexually neutral or, at most, ambiguous," is not "within the reach of Title VII." Tietgen, 921 F. Supp. at 1501, quoting Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996). Burns has failed to offer any evidence that the conduct of Bjorn or any other action of UniNet or SCCI occurred because of her gender. The conduct complained of -- paying attention to Burns, discussing personal matters with Burns, providing sales assistance to Burns, asking Burns to attend office happy hours, joking around with Burns, discussing his marriage with Burns and alleging retaliation against Burns is "sexually neutral or, at most, ambiguous." See, e.g., Hopkins, 77 F.3d at 753 (causation element not satisfied by supervisor who stares at employee in bathroom, kisses employee at receiving line at his wedding and bumps into employee); McWilliams v. Fairfax Board of Supervisors, 72 F.3d 1191, 1193 (4th Cir. 1996) (offensive teasing and jokes are sexually neutral and, therefore, not actionable conduct). Burns has failed to prove by a preponderance of the evidence that UniNet or SCCI took any

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[2] Following the Supreme Court's ruling in Burlington Indus., Inc. v. Ellerth, supra the Court does not need to consider the fourth prong.

action or retaliated against her or harassed her because of her gender. There is no evidence that any of the business policy or practices of UniNet were created, administrated or enforced with respect to Burns because of her gender. To the contrary, the business policies and practices of UniNet were enforced equally without regard to gender.

B. Count II of the Complaint

7. In Count II of her Complaint, Burns alleges that UniNet and SCCI violated Title VII by permitting a hostile environment with respect to her gender.

8. For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Relief is unavailable where the alleged conduct "is not severe or pervasive enough to create an objectively hostile or abusive work environment." Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993)

9. The Supreme Court rejected any sweeping expansion of the hostile work environment standard:

> And there is another requirement that prevents Title VII from expanding into a general civility code.... The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions" of the victim's employment. Conduct that is not severe or Pervasive enough to create an objectively hostile or abusive work environment --

> an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's cases.

Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998) (citations omitted) (emphasis added). Accordingly, courts have confirmed the scope of actionable conduct to be that which is so objectively offensive as to alter the conditions of the plaintiff's employment. See, e.g., Hartsell v. Duplex Products, Inc., 123 F.3d 766 (4th Cir. 1997) (insensitive and demeaning comments by supervisor did not establish a severe or pervasive abusive environment); Spicer v. Commonwealth of Virginia, 66 F.3d 705 (4th Cir. 1995) (public memo about plaintiffs nipples considered severe and pervasive); Swain v. Roadway Express, 71 FEP Cases (BNA) 71, 73-74 (D. Md. 1996) (reasonable jury could find sexual harassment based on plaintiffs allegations that her co-workers had touched her in an inappropriate and threatening manner).

10. In assessing whether the work environment rises to the level of "severe and pervasive," a court must look to the totality of the circumstances including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance.

Beardsly v. Webb, 30 F.3d 524, 529 (4th Cir. 1994), quoting, Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993). Further, the court may not view the behavior in a vacuum, but must give

"careful consideration of the social context in which the particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. at 1003 (recognizing that a coach's patting the behind of a football player is different than an office setting).

11. Burns alleges that Bjorn harassed her because of her gender by asking her to attend after work office happy hours, which other employees were invited to attend, and by flirting with her, and retaliating against her when she allegedly rejected the flirtation. Such conduct does not create "an environment that a reasonable person would find hostile or abusive." Harris, 510 U.S. at 21. Moreover, there is no evidence that Burns gave any indication that the conduct was unwelcome.

12. Burns' claim of hostile environment sexual harassment also relates to the business policies and practices of UniNet. Burns claims that UniNet promulgated, administered and enforced some of its sales, ordering and shipping policies and practices to her detriment because of her gender. The sales and shipping policies and practices of UniNet are legitimate business policies and practices and Defendants have articulated legitimate business reasons for their promulgation, administration and enforcement.

13. Burns must produce evidence that her gender was the reason for Defendants' actions. She has not done so. There is ample evidence in the record that UniNet created, administered and enforced its policies and practices without regard to gender.

14. Just as Burns is unable to present sufficient evidence of sexual harassment against her, she fails to present any

evidence of a pattern of sexual harassment by Bjorn. Burns alleges that Bjorn selected first herself, then Temple, and then Kearns, as "targets" of his "flirtations" during 1991-92.[3] According to Burns' theory, once his "flirtations" were rejected, Bjorn began retaliating against each of me thee women. Complaint at ¶¶ 18-26. The evidence refutes these allegations. First, the record is devoid of any evidence that Bjorn sexually harassed Burns, Temple, or Kearns. Harris, 510 U.S. at 21-22 (requiring severe and pervasive conduct that creates an objectively hostile or abusive work environment). Both Temple and Kearns admit that they initiated the conduct or conversations with Bjorn that Burns alleges were unwelcome advances. Finally, neither Temple nor Kearns offered any evidence of discrimination or retaliation by Bjorn.[4] Temple admitted that she quit working at UniNet while she was on probation for poor performance. Kearns voluntarily resigned after a poor sales performance review with management. Such evidence does not demonstrate an objectively hostile or abusive workplace under the current standard

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[3] By Burns' own terms, the alleged pattern, at most, is an alleged pattern of "flirtation," not sexual harassment.

[4] Such testimony from co-workers may not even be admissible at trial to support Burns'claims. See Beyda v. Los Angeles, Daily Labor Report (BNA) (Cal. Ct. App. July 9, 1998) ("evidence of harassment of others, and of a plaintiff's awareness of that harassment is subject to the limitations of the hearsay rule" making them admissible at trial only if the plaintiff was present at the time the incidents occurred).

established in Oncale.

15. To pursue her claims, Burns must have filed a complaint with the EEOC within 180 days of the incident, or within 300 days of the incident if state or local proceedings are initiated. 42 U.S.C. § 2000e-5(e)(1). "Incidents outside of the statutory window are time-barred unless they can be related to a timely incident as a 'series of separate but related acts' amounting to a continuing violation." Beall v. Abbott Lab, 130 F.3d 614, 620 (4th Cir. 1997), quoting Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980) (per curiam).

16. All of Burns' claims, except the one for retaliation, are time-barred. Burns filed her initial EEOC complaint for "sex discrimination (sexual harassment)" on November 28, 1994. Except for the one conversation with Bjorn that Burns alleges took place at the Frederick office copy machine sometime after March 1994, all incidents of alleged sexual harassment and discrimination occurred during Burns' first period of employment with UniNet in 1991-92. Burns has testified that she believes that she was being harassed, discriminated against and forced to work in a hostile work environment during her initial period of employment in 1991- 92. These incidents occurred more than two years before Burns filed her initial EEOC charge on November 28, 1994. Moreover, these alleged incidents occurred before Burns voluntarily resigned from UniNet in August 1992. All alleged incidents occurring during Burns' first period of employment period are therefore time-barred.

17. The only alleged incident that arguably occurred during the 300 days prior to November 28, 1994 is the

conversation between Burns and Bjorn at the copier, which took place according to Burns after Heidelberger left in March 1994. More than any of the alleged incidents, this harmless conversation (during which Burns alleges Bjorn informed her that he had separated from his wife) falls far short of any evidence of sexual harassment or discrimination. Hartsell, 123 F.3d at 772; Reinhold, 135 F.3d at 931; Green v. Fairfax County School Board, 832 F. Supp. 1032,1039 (ED. Va. 1993) aff'd, 23 F.3d 400 (4" Cir. 1994).

18. Consequently, Burns "cannot rely on time-barred events under the 'continuing violation' theory because no timely violation has been alleged." Beall, 130 F.3d at 621, citing Woodward v. Lehman, 717 F.2d 909, 915 (4th Cir. 1983) (continuing violation theory available "only where an actual violation has occurred within that requisite time period") (emphasis in original). Furthermore, Burns has no ability to allege a "continuing violation" because her employment with UniNet did not continue after these alleged incidents. As such, Burns' claim of sexual harassment are time-barred and must be dismissed.

C. Count IV of the Complaint[5]

19. To prove her claim of retaliation, Burns must show that (1) she engaged in a protected activity, such as filing a complaint with the EEOC; (2) UniNet acted adversely against her; and (3) the protected activity was causally connected to UniNet's adverse action. Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994).

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[5] The court has grated Defendants' Motion for Summary Judgment as to Count III, sex discrimination.

Burns has demonstrated that she has met the two elements of proof, she filed an EEOC charge and UniNet discharged her. However, Burns has offered no evidence to support the third element of her retaliation claim.

20. Where no other evidence supports a finding of retaliatory motive, the temporal proximity between the discovery of an EEOC charge and an employee's termination is insufficient to show a causal connection. Mathis v. Perry, 996 F. Supp. 503 (E.D. Va. 1997), citing Cooper v. City of North Olmstead, 795 F.2d 1265, 1272 (6th Cir. 1986) (finding that plaintiff s discharge four months after filing discrimination claim did not support inference of retaliation); Verbanic v. Veco, Inc., 1991 WL 23467 (9th Cir. 1991) (given lack of other evidence of retaliation, proximity of five or six weeks did not justify inference of retaliation in discharge case). Because she has not offered any evidence of retaliatory motive, Burns' claim of retaliation fails.

21. Even assuming that Burns could demonstrate that retaliation was a motivating factor for her discharge, UniNet need only articulate a legitimate non-retaliatory explanation for its decision to terminate her employment. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) It has done so. Burns consistently complained about and refused or was unable to comply with UniNet's established policies and procedures for sales representatives and she left work stating that she could not work at UniNet. These complaints increased dramatically following UniNet's denial of her second salary extension request in October 1994. In addition, Burns' sales performance had declined by early 1995. Moreover, Burns admitted on her last full day of

employment that she was unable to perform her job based upon a "lack of motivation." These undisputed facts establish a legitimate non-retaliatory explanation for UniNet's decision to discharge Burns. See Ennis v. Nat'l Assoc. of bus. & Educ. Radio, Inc., 59 F.3d 55 (4th Cir. 1995) (filing EEOC charge or fact employee is member of protected class does not excuse misconduct or immunize employee from discipline); see also Mathis, supra at 519 n.39 (summary judgment in favor of employer on retaliation claim based upon insubordination of plaintiff, employee cannot "set her own work terms").

22. One incident exemplifies Burns' insubordination. In early 1995, UniNet's Chairman directed UniNet's president, Bjorn, to call on UniNet's four or five biggest accounts, which included Loudoun Hospital, to demonstrate the company's continued commitment to their needs. In response to Burns' complaint memo regarding Bjorn's contacts with Loudoun Hospital, UniNet's Chairman, Harris, visited Burns at the Frederick office to explain he had directed Bjorn to contact Loudoun Hospital and UniNet's other largest customers. Harris also explained why it was advantageous to all sales people for management to ensure that UniNet's customers were satisfied and that all customers, especially the largest ones, could call on the president of the company. Harris specifically told Burns that this "was an important function for a president of the company to do." Despite this explanation from UniNet's Chairman, two weeks later Burns wrote another memo complaining again about Bjorn's contacts with Loudoun Hospital. See Def. Exhibit 16. This second memo demonstrates Burns' inability and unwillingness to

follow UniNet procedures and management directives, even after Harris explained them to her and instructed her to follow them. Insubordinate conduct like this establishes UniNet's legitimate business reasons for discharging Burns.

23. Having established a legitimate, non-retaliatory basis for her termination, the burden then shifts to Burns to prove by admissible evidence that UniNet's stated reasons are a pretext for retaliation. Ross, 759 F.2d at 356. To prove pretext, Burns must show that the reasons given for her termination are false, and that discrimination was the real motivating factor. Moreover it is not sufficient for Burns to produce evidence that reasonable minds might differ as to whether she was justifiably terminated. She must introduce evidence that affirmatively shows that her alleged complaint of discrimination was a factor in the discharge. See Tarivo v. Southeriand Corp., 68 FEP Cases (BNA) 1406, 1409 (D. Md. 1995).

24. Burns' only explanation is her subjective belief that she was adequately performing her duties as a senior sales representative. Merely refuting the employer's reasons does not meet the standard of showing the true motivating factor to be retaliation. See Jimenez, 57 F.3d at 383 ('The crucial issue in a Title VII action is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment"); Hoeppner v. Crotened Mountain Rehab. Ctr., 31 F.3d 9 (1st Cir. 1994).

D. SCCI And UniNet Are Not A Single Employer

25. Burns has also claimed that SCCI is liable because it is a single employer within UniNet. For SCCI to be liable for

the claims alleged in the Complaint, Burns must present sufficient evidence that SCCI was her employer. SCCI was not Burns' employer because it did not "control the [UniNet's] employment decisions or so completely dominate [UniNet] that the two corporations are the same entity." Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980 (4th Cir. 1987)[6]. Courts will peer behind the corporate veil "only in extraordinary circumstances" and if the parent dominates the subsidiary "to the extent that the subservient corporation manifests no separate corporate interest of its own and functions solely to achieve the purposes of the dominant corporation." Johnson, 814 F.2d at 98 1, quoting, Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973). Under this authority, Burns must produce admissible evidence to establish that SCCI was her employer. Burns fails to satisfy this burden.

26. In an employment context, a parent corporation can be the employer of a subsidiary's workers if it exercises excessive control in one of two ways:

First, the parent could control the employment

---

[6] SCCI is neither the parent corporation of UniNet nor an affiliated corporation of UniNet. SCCI and UniNet have only one common shareholder, Leo Harris; the two companies have regular business dealings, for which both corporations invoiced and paid at a non-discounted rate. Therefore, the standard enunciated by the Fourth Circuit for ingle employer liability in the "parent-subsidiary" relationship should be even more strictly applied in the present case.

> practices and decisions of the subsidiary. If the parent company hired and fired the subsidiary employees, routinely shifted them between the two companies, and supervised their daily operations, it would be hard to find that the parent was not their employer. Second, the parent might so dominate the subsidiary's operations that the parent and the subsidiary are one entity and thus one employer. For example, the subsidiary may be highly integrated with the parent's business operations, as evidenced by the commingling of funds and assets, the use of the same work force and business offices for both corporations, and the severe undercapitalization of the subsidiary. The parent might also fail to observe such basic corporate formalities as keeping separate books and holding separate shareholder and board meetings.

Johnson, 814 F.2d at 981. The evidence establishes that SCCI neither controlled the employment practices and decisions of UniNet nor dominated UniNet's operations so that the companies "are one entity and thus one employer."

27. The evidence demonstrates that SCCI and UniNet are separate corporations, maintain separate corporate structures, are involved in entirely different fields of business, maintain separate bank account, corporate records and accounting systems, do not share employees, maintain separate employment practices and structures, and maintain separate business offices in different

states. Although UniNet's chairman, Harris, appointed Morrell to conduct the independent investigation of Burns' charge of harassment, neither Morrell nor SCCI had any control or dominance of UniNet's employment practices and policies. While Harris also asked Edward Bjorn to attend meetings on his behalf regarding the investigation, neither Edward Bjorn nor SCCI had any role in the decision to discharge Burns. Burns' immediate supervisor, John Lyons, made the decision to terminate Burns, a decision Harris supported.

28. Harris requested Morrell and Edward Bjorn to assist UniNet to ensure an independent investigation of Burns' claim of harassment. Such de minimis participation does not establish that SCCI controlled UniNet's employment practices or that SCCI so dominated UniNet that the two companies could be considered "one entity and thus one employer." See, e.g., Johnson, 814 F.2d at 981 (granting summary judgment for defendant employers when no evidence that parent company "excessively interfered with the business operations" of subsidiary); Harris v. Palmetto Tile, Inc., 833 F. Supp. 263, 265-66 (granting summary judgment for employers). Burns' failure to establish a single employer relationship between UniNet and SCCI mandates that the Court enter judgment for SCCI.

E. Burns Has Failed To Mitigate Her Damages

29. A Title VII plaintiff is not entitled to back pay damages if she did not exert reasonable efforts to mitigate her damages. Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1358 (4th Cir. 1995). The duty to mitigate damages requires that the claimant be reasonably diligent in seeking and accepting new

employment substantially equivalent to that from which she was discharged. Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1273 (4th Cir. 1995). Burns' refusal to seek employment of any kind since December 1997 is a breach of her duty to mitigate her damages. Therefore, Burns should not be entitled to any damages for back pay after December 1997.

30. A Title VII plaintiff cannot remain idle after discharge and receive back pay for that period when she was not actively seeking employment; a discharged employee must make reasonable efforts to find other suitable employment. Brady, 753 F.2d at 1273. When a discharged Title VII plaintiff subsequently finds similar employment, but voluntarily ends her employment, back pay should be decreased by the amount she would have earned had she not ended her employment. Id. Burns claims she was forced out of her job with Loudoun Computer Services in December 1997 when her request to work from home full-time was denied. Because the request was unreasonable, the termination of her job with Loudoun Computer Services was voluntary. She was employed by Loudoun Computer Services from August 1995 to December 1997. Burns' claim for back pay should, therefore, be reduced by the amount she would have earned at Loudoun Computer Services had she not voluntarily terminated her job in December 1997.

31. A Title VII plaintiff's claim for back pay should be reduced by any earnings acquired by the employee during the interim period, regardless of the type of work involved. Brady, 753 F.2d at 1274-75. Burns was employed in computer sales at Loudoun Computer Services for the period August 1995 to

December 1997 and earned a total off $146,805.84 during that period. Therefore, Burns' claim for back pay must be reduced at least by $146,805.84. Because Burns earned more in salary and commissions at Loudoun Computer Services than she did while employed at UniNet, her back pay claim is zero for the period August 1995 through December 1997.

32. A Title VII claimant must also use reasonable diligence to maintain any suitable employment which is secured after the discharge. Brady, 753 F.2d at 1277. A claimant who fails to do so in effect voluntarily removes herself from the job market and forfeits her right to back pay. Id. Burns failed to use reasonable diligence to maintain her employment with Loudoun Computer Services. Burns' request that she be permitted to work full time from home was unreasonable. As such, Burns voluntarily removed herself from the job market in December 1997, thereby waiving her right to back pay.

33. The only recognized exceptions to a claimant's duty to use reasonable diligence to maintain subsequent employment are (1) if the employer places unreasonable working conditions on the employee or (2) if the employee is earnestly searching for better employment. Brady, 753 F.2d at 1278. Neither of the exceptions applies to the present case. First, Loudoun Computer Services reasonably refused to allow Burns to work full time from her home when she was employed as a full time sales representative. Loudoun Computer Services required full time employees to work from their offices. As an employee, Burns was required to "act reasonably and responsibly in accordance with employer rules." id. at 1277. She did not. Second, Burns made

a higher income while employed by Loudoun Computer Services than she did while she was employed by UniNet. Moreover, Burns has stated that she could no longer seek employment or work after December 1997 and that her decision not to seek employment and not to work had nothing to do with searching for better employment.

34. Burns failed to satisfy her duty to mitigate her damages during the period immediately following her discharge from UniNet on March 10, 1995. A Title VII claimant must be reasonably diligent in accepting new employment substantially equivalent to that from which she was discharged. Brady, 753 F.2d at 1273, citing, Ford Motor Co. v. EEOC, 458 U.S. 219, 232 (1982). While she did pursue similar employment and attended a number of job interviews during the April to May 1995 time period, Burns unreasonably refused to accept an offer of employment from one computer sales company, CMS, and failed or refused to submit a written proposal of her required terms of employment with another computer company, Altair Associates. Such unreasonable actions constitute a failure to diligently accept substantially equivalent new employment. Therefore, Burns has waived her claim for back pay for the period April 1995 through August 1995 when she finally accepted employment with Loudoun Computer Services.

V. CONCLUSION

For the foregoing reasons, and those that may be advanced during oral argument, Defendants UniNet, Inc. and Southeastern Computer Consultants, Inc. respectfully request that their Proposed Findings of Fact and Conclusions of Law be adopted by

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the Court.

Respectfully submitted,

/s/ David J. Ervin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 9, 1998, a true copy of the foregoing Defendants' Proposed Findings of Fact and Conclusions of Law was served upon the below listed

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/s/ David J. Ervin
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
JOHN E. BJORN, et al.,	)	
	)	
Defendants.	)	

MOTION FOR JURY TRIAL PURSUANT TO FED R. CIV. P. 39(b)

COMES NOW, plaintiff, Patricia B. Burns, by counsel, pursuant to Fed. R. Civ. P. 39(b) and moves for the entry of an order allowing trial by jury on the issues of liability, compensatory damages and punitive damages on the following grounds:

1. On November 28, 1994 while in the employ of defendants UniNet, Inc. ("UniNet")/Southeastern Computer Consultants, Inc.("SCCI") plaintiff filed a complaint alleging sexual harassment with the U.S. Equal Opportunity Employment

Commission ("EEOC") for the for the purpose of obtaining applicable remedies available to her on account of said harassment, including, but not limited to the cessation of future harassment and the preservation of her computer sales position. Plaintiff retained the law firm of DiMuro, Ginsberg & Lieberman to assist her in the process and defendant UniNet retained the firm of Miles & Stockbridge, P.C. to assist IT in defending against the complaint.

2. On March 10, 1995, while the EEOC complaint was pending, defendants UniNet/SCCI terminated plaintiff's employment.

3. On May 19, 1995, with the assistance of the law firm of DiMuro, Ginsberg & Lieberman plaintiff filed a second complaint with the EEOC alleging that the termination of her employment was in retaliation for her filing of the EEOC complaint on November 28, 1994. Defendant UniNet retained the law firm of Miles & Stockbridge, P.C. to respond to the second EEOC complaint.

4. At all times plaintiff desired that the EEOC would accomplish an expeditious resolution of the complaints.

5. During the period from the filing of the complaints to September of 1997 the EEOC assigned and removed more than five investigators from her case as set forth in correspondence from Andrew R. Gordon, Esquire to Mr. Howard Cohn of the EEOC attached hereto as Exhibit A.

6. On or about November 7, 1997 plaintiff received notice from the EEOC that the agency declined to pursue her case further on account of the fact that its policy on processing cases of discrimination had changed to direct most of the agency's

resources to an early assessment of charges and based upon that policy the EEOC declined to further pursue investigation of her charges since it had not done so earlier.

7. In response to the notice referred to in paragraph 6 plaintiff's counsel attempted to have the determination reconsidered but was unsuccessful.

8. Upon learning that the EEOC declined to reconsider its position plaintiff and her counsel were unable to agree upon a mutually satisfactory agreement for future representation and the relationship between them terminated in mid-November of 1997.

9. A Notice of Right to Sue was issued by the EEOC to plaintiff on December 23, 1997 and received by her shortly thereafter. A copy of the Notice is attached as Exhibit B.

10. Plaintiff had difficulty in obtaining alternative counsel and finally in late December of 1997 retained the services of her present counsel, an acquaintance of many years who was then in the process of moving his law practice.

11. Prior to filing the complaint herein on March 19, 1998 plaintiff's counsel expended 7.2 hours in reviewing documents and factual information, 16.2 hours in legal research and 40.8 hours drafting the complaint. An accounting of time expended is attached hereto as Exhibit C.

12. Continuously from the time that plaintiff learned of the results of the EEOC investigation plaintiff has desired to have the factual issues existing in this cause determined by a jury.

13. Plaintiff's counsel was of the belief that a jury request had been placed upon the pleadings when filed; however,

upon the appearance of the parties at the pre-trial conference on September 17, 1998 plaintiff and her counsel where advised by the Court that no request for jury trial had been made, whereupon plaintiff's counsel advised the Court of the desire for a jury trial and his belief that the pleadings had contained a jury demand.

14. The pleadings do not contain a jury demand. The absence of the demand is the result of human error in the review of the final draft of the pleadings occasioned by the complexity of the factual allegations which the case was perceived to require and the attention to the inclusion of all of the elements peculiar to an area of law not previously undertaken by counsel at the expense of the most basic and cherished element of American jurisprudence.

15. The issues presented for factual determination do not involve complex questions of technical or scientific expertise, rather, it is anticipated that there will be sharp contrast in the facts presented by witnesses for the plaintiff and those presented by the defense. The initial factual determinations will turn upon an assessment of the credibility of the witnesses for each of the parties, a determination particularly suited for a collective assessment by a jury. Where credibility is not at issue, then the factual assessment will require a determination of the intent with which an act was done, another area of inquiry particularly suited for a jury's determination.

16. Defendants have conducted full and complete discovery. The time remaining until the scheduled trial date provides ample opportunity for the defendants to fully prepare for trial by jury and accordingly the grant of a jury trial will cause no

prejudice to defendants.

17. The grant of a jury trial at this time should allow this matter to proceed as scheduled, without delay or other imposition of adverse effect upon the Court's docket.

PATRICIA B. BURNS

By: /s/ Larry A. Pochucha
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September 1998, I caused to be served a true copy of the foregoing Motion to the following offices as indicated below:

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Larry A. Pochucha

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
JOHN E. BJORN, et al.,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR JURY TRIAL PURSUANT TO FED R. CIV. P. 39(b)

On March 19, 1998 plaintiff filed her Complaint. On or about April 9, 1998 all defendants filed their Answers. The Complaint filed by plaintiff did not include a jury demand. Plaintiff has consistently desired that her case be tried to a jury and plaintiff's counsel was under the mistaken impression that the Complaint contained a jury demand until the pre-trial conference on September 17, 1998 when the Court advised that the pleadings contained no demand. Plaintiff's counsel expressed to the Court

at that time his belief that the demand appeared in the pleadings and defendants' counsel immediately assured the Court that the demand was not present. On September 17, 1998 the case was set for trial on November 24, 1998.

ARGUMENT AND LAW

Fed. R. Civ. P. 38 requires that a demand for trial by jury be filed "not later than 10 days after the service of the last pleading directed to such issue". Local Rule 38 requires that a demand for jury trial in a civil action must be in writing and filed strictly in accordance with Fed. R. Civ. P. 38. Fed. R. Civ. P. 39(b) provides that notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues. It is clear from the plain language of the statute that the decision of whether or not to grant relief is a matter addressed to the sound discretion of the trial court. Malbon v. Pennsylvania Millers Mut. Ins. Co., 636 F.2d 936, 940 (4th Cir. 1980).

Vannoy v. Cooper, 872 F. Supp. 1485 (E.D. Va. 1995) sets forth an extensive review of the law related to the consideration of a motion pursuant to Fed. R. Civ. P. 39(b). The factors which Vannoy asserts should be considered are: the four factors set forth in Malbon, 636 F.2d at 940, namely, (1) whether the issues are more appropriate for determination by a jury or a judge (i.e., factual versus legal, legal versus equitable, simple

versus complex); (2) whether permitting a jury trial would prejudice the opposing party; (3) when the motion was made (early or late in the proceedings); and (4) whether granting a jury trial would affect adversely the court's docket and the orderly administration of justice and a fifth factor, (5) the justifiability of the delay. Vannoy, 872 F. Supp. At 1489.

As stated in the accompanying motion, the complaint filed herein sets forth in detail the facts which support plaintiff's cause of action. It is alleged that John E. Bjorn, while acting in his capacity as President of UniNet, Inc. ("UniNet") pursued a course of sexually predatory conduct with at least three women including the plaintiff. It is further alleged that in his capacity as President, defendant Bjorn, manifested a sex based animus toward women in general. Defendant Bjorn denies all allegations.

The sexually predatory conduct of defendant Bjorn consisted of using his position to hire women whom he found attractive. After hire, Mr. Bjorn was extremely solicitous of such women, treating them more favorably in the work place than others and by subtle artifice attempted to draw those women into a romantic relationship with him.

In the instance of each of the three women, when it became apparent that Mr. Bjorn's advances were unwelcome, Mr. Bjorn reversed his treatment of them and pursued a course of conduct to force them to depart from the employ of UniNet. The plaintiff, Ms. Maureen Schaefer and Ms. Sue Foreman Temple

have each testified in deposition that they were subject to flirtatious behavior by Mr. Bjorn. Mr. Bjorn denies any flirtatious behavior except a single kiss with Ms. Temple.

The plaintiff and those witnesses testified that Mr. Bjorn's treatment of them changed drastically after they made it clear that they would not respond to Mr. Bjorn's flirtatious behavior. Mr. Bjorn denies any change in treatment.

Plaintiff alleges that a fourth female UniNet employee was subject to Mr. Bjorn's advances, but welcomed them. Mr. Bjorn denies that he made advances upon the fourth woman in the work place although the woman, Laura Brooks is now the current Mrs. Bjorn and holds a management position at UniNet.

Plaintiff filed her EEOC complaint on November 28, 1994. On March 9, 1995, she suffered such emotional trauma as a result of Mr. Bjorn's threats to upset her largest account, that she could not physically remain on the job, departed and left her supervisor a memorandum to that effect. When she returned on the following day, she was fired for leaving early and other unspecified failures to comply with company policies and procedures.

The question of whether Mr. Bjorn is to be believed or whether plaintiff and her witnesses are to be believed are questions of fact which the jury system is uniquely designed to resolve. Further, the circumstances surrounding Ms. Burns' termination lend themselves to discussion and the application of the diverse

backgrounds and perspectives which the collective body of a jury provides. These are but a portion of the many factual issues which must be resolved in determining whether the plaintiff was the subject of sexual harassment, discriminatory treatment and/or retaliation.

The law firm representing defendants UniNet, Inc. and Southeastern Computer Consultants, Inc. has had since November of 1994 to gather facts pertaining to plaintiff s claim since the firm was hired by UniNet, Inc. in November of 1994. The defense of defendant Bjorn who has separate counsel is not in conflict with that of the corporate defendants. No prejudice from the award of a jury trial will result to defendants.

Oral notification of plaintiff's desire for a jury trial was conveyed on September 17, 1998. Pursuant to Fed.R.Civ.P.38, plaintiff's notification was due on April 19, 1998; however, at that time plaintiff was laboring under the mistaken impression that the request had already been made. Plaintiff asserts that when considering the timing of this request, the Court should look to the passage of time from this Motion to September 17, 1998, the date of the pre-trial conference and the date on which plaintiff became aware that the complaint did not include a jury demand.

Plaintiff is unfamiliar with the internal scheduling of the Court, but assumes that a timely and favorable disposition of her motion would allow the fill to proceed as scheduled on November 24, 1998 with a jury.

The Complaint is twenty pages long and consists of eighty one paragraphs setting forth in detail the factual basis of plaintiff's claim In the Motion and Exhibits filed simultaneously herewith plaintiff's counsel represents to the Court that prior to the filing of the Complaint he expended 16.2 hours conducting legal research and another 40.8 hours drafting the Complaint. Counsel further represents to the Court that the time expended in drafting which most likely includes some additional research time was expended as a result of the complexity of the factual allegations and the need to insure that all of die elements of an area of law not previously undertaken were addressed.

Counsel does not claim illness or inexperience in this Court as justification for plaintiffs failure to assert a jury demand. It was thought that the demand had been included in the Complaint. The submission of time expended in research in advance of the filing of the complaint and drafting of the complaint itself is provided to demonstrate an absence of intentional neglect or failure to diligently pursue the matter undertaken. It is submitted that requisite advance time and effort were expended to accomplish the task in a competent matter; the requirement of the Rule is not at issue. Lack of effort was not the cause of the omission. The frailty of human nature is neither an excuse nor a refuge, but the only accounting available.

In General Tire and Rubber Company v. Watkins, 331 Fed 2d 192, 197 (1964) the Court affirmed a denial of the motion pursuant to Rule 39 (b) stating:

We recognize the principle as often enunciated by the courts, that there may be exceptional circumstances present which would appear to compel the Court in the exercise of its discussion to order a jury trial.

In the case under consideration, the plaintiff was required to wait nearly three years for the Equal Employment Opportunity Commission to tell her that because the agency had waited so long to consider her case that the guidelines requiring it to assess cases early required termination of further consideration of her complaint.

The executive branch of her government having delayed and denied resolution of her claims, the plaintiff then pursued a forum where a long awaited resolution would be provided by her peers. Absent a favorable ruling upon her motion, such a resolution can never occur. The right to trial by jury is considered to be the great equalizer by much of the population. On the another hand, a small portion believes that the common sense of the general populous is inferior to consideration of facts by a highly educated and specialized expert. The integrity of the constitutional right to trial by jury remains intact at this time, subject only to procedural rules enacted for the purpose the orderly administration of justice

The allowance of a trial by jury in this instance will not constitute a disruption of that orderly process of justice but will demonstrate the application of reasoned judgment upon an

individual basis. Such a consideration of the totality of the circumstances presented which weighs the rights of the individual against the legitimate needs of the government is the hallmark of our system of justice.

CONCLUSION

In accordance with the foregoing authority and facts, it is respectfully requested that the Court grant plaintiff s motion for a trial by jury.

PATRICIA B. BURNS

By: /s/ Larry A. Pochucha

Attorney for Plaintiff
Larry A. Pochucha, Esquire
VSB No. 15674
COATES & DAVENPORT
5206 Markel Rd., #200
P.O. Box 11787
Richmond, VA 23230
(804) 285-7000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September 1998, I caused to be served a true copy of the foregoing Motion to the following offices as indicated below:

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THE LAW OFFICES OF
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(via telefax and first class postage prepaid mail)

/s/ Larry A. Pochucha
Larry A. Pochucha

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 98-382-A**
	)	
JOHN E. BJORN, et al.,	)	
	)	
Defendants.	)	

ORDER

The matter comes before the Court on defendants' motion for summary judgment, defendants' motion to strike plaintiff's affidavit, and plaintiff's motion for jury trial.

For the reasons stated from the Bench, it is hereby **ORDERED** that

(i) plaintiff's motion for jury trial is **DENIED**;

(ii) defendants' motion to strike plaintiffs affidavit is **DENIED**; and

(iii) defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the motion is **GRANTED** as to Count III: Sex Discrimination, and Count III **DISMISSED** with prejudice. The motion is **DENIED** in all other respects.

It is further **ORDERED** that counsel **are** to inform the Court by 5 P.M., Monday, November 2, 1998, if the parties are interested in mediation facilitated by a magistrate judge.

The Clerk is directed to send a copy of this Order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PATRICIA B. BURNS,
Plaintiff,

v. **Civil Action No. 98-382-A**

JOHN E. BJORN, UNINET, INC.; and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,
Defendants.

REPORTER'S TRANSCRIPT

HEARING ON MOTIONS

Thursday, October 29, 1998

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: COATES & DAVENPORT
BY: LARRY ARTHUR POCHUCHA, ESQ.
5206 Markel Road
Richmond, VA 23230

For the Plaintiff

MICHAEL A. RODRIQUEZ, RPR/CM/RMR
Official Court Reporter
USDC, Eastern District of Virginia
Alexandria Division

ATTORNEY SILVESTRI: Yes, that's correct. But her argument is different, your Honor.

THE COURT: All right. All right, thank you, Mr. Silvestri.

ATTORNEY SILVESTRI: Thank you, Judge.

RULING BY THE COURT

THE COURT: There are two motions that I'll deal with to begin with.

The first is a motion to strike the affidavit, citing the Green opinion that I wrote.

That motion is denied. I am not persuaded that the contradiction is of the same nature, either that one or the one about abiding by policies, and "I had a tough time accepting management decisions," and the like.

However, at some later proceeding the defendant can certainly -- defendants can certainly show this to impeach any testimony given by the plaintiff. So the motion to strike the affidavit is granted -- denied, rather.

The motion for a jury trial is denied.

I have reviewed the motion and the supporting memorandum and the opposing memorandum. Cited by the plaintiff is an Eastern District decision which-- cited five factors for the Court to consider in exercising, its discretion.

That shouldn't be erroneously construed to mean that if you apply those factors and they tend to weigh generally one way or the other, that the failure to grant a jury is an abuse of discretion. They are merely factors to take into account.

The one factor that is missing from that list -- because I don't believe it's inclusive -- is the integrity of the rules. The rules say "X," they don't say "X, but only X if these five factors are not met."

So, while some of the factors might support the exercise of discretion to grant a jury in this case, such as the fact that it's a garden variety case and it is something a jury could hear, and whether or not there is prejudice or not is probably unlikely, but, in the Court's view, it has rules set up for the administration of its docket which it follows, and it makes decisions based on counsel complying with the Rules of Civil Procedure, and this docket proceeds very briskly in a very orderly manner, and it requires that counsel pay attention to the rules and abide by the rules.

So the motion for a jury pursuant to 39(b) is denied.

Now we come to the motion for summary judgment.

In essence, the Court grants the motion in

CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the hearing on motions in the case of PATRICIA B. BURNS v. JOHN E. BJORN, et al.

I further certify that I was authorized and did report by stenotype the proceedings in said hearing on motions, and that the foregoing pages, numbered 1 to 84, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed

my name this 30th day of December, 1998.

/s/ Michael A. Rodriquez

Michael A. Rodriquez, RPR/CM/RMR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
----------x

PATRICIA B. BURNS,
Plaintiff,

-vs- Case No. 98-382-A
UNINET, INC.,
and SOUTHEASTERN COMPUTER
CONSULTANTS, INC.,
Defendants.
---------- x

Monday, December 7, 1998
McLean, Virginia
De Bene Esse Deposition of
CHARLES TITUS, M,D,
called for examination by counsel for the Plaintiff, pursuant to notice, held at the offices of Miles & Stockbridge, 1751 Pinnacle Drive, Suite 500, McLean, Virginia, beginning at 3:00 P.M., before Devy Khou, RPR, a notary public in and for the Commonwealth of Virginia, when were present on behalf of the respective parties:

25

the defense witnesses.

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q. Dr. Titus, would you state your full name for the record?

A. Charles C. Titus.

Q. Would you describe for the court your educational background, sir?

A. I went to medical school at Case Western Reserve University in Cleveland, Ohio, graduating in 1960. I did an internship in internal medicine at the University of Virginia Hospital, 1960 to '61; and my training in psychiatry, my psychiatric residency was at the University of Colorado Medical Center 1961 to '64.

Following that, I was on the faculty at the University of Colorado Medical Center, Department of Psychiatry for a year as an instructor.

After that, I went into private practice in Denver.

Q. Private practice as a psychiatrist?

A. Yes.

Q. And do you hold any certifications or memberships related to your profession?

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A. I'm board certified in psychiatry by the American Board of Psychiatry and Neurology. I'm a member of the American Psychiatric Association, the Washington Psychiatric Society and Virginia Medical Society -- Medical Society of Virginia.

Q. What's the year in which you were board certified?

A. 1970.

Q. Would you describe your practice in the field of psychiatry since the completion of your education?

A. The bulk of my practice has been in solo private practice consisting mostly of psychotherapy plus psychopharmacology for my patients. I have held, from time to time, some part-time jobs as a psychiatrist, One was at the hospital where I first practiced psychiatry in Denver, Bethesda Hospital. Another was at the Veterans Administration Hospital in Denver, I've also worked at the Northwest Community Mental Health Center in Reston, Virginia,, on two different occasions, that is, two different blocks of time, one from 1980 to about 1985 or '6 and then

approximately 1989 or 190 to the present,

Q. And in each of those positions, you were

service her account.

Q. And what,, if anything, did you do as result of that meeting with regard to her therapy or continued welfare?

A. We continued the Amitriptyline and the Xanax.

Q. How would you describe Ms. Burns condition at that point from a medical standpoint?

A. Well, diagnostically, she would be called adjustment disorder, at that point severe, barely able to function. Her ability to concentrate and focus was poor. She is extremely anxious.

When she said, "I don't know how I'm hanging in, continuing to work," she very well described how desperate she felt,

Q. Did you have occasion to see her again at a time when UniNet was discussed?

A. Yes, She came in in March, March 14th, 1995, and her first statement was that she had been fired which was a major surprise to her because she had had a great review the week before. She said, after the review, they had sabotaged a couple of her accounts, and she mentioned an account at

Loudoun Hospital and then complained that they took control of her accounts. She became panicked and

had to leave work at noon on one of the days when this was happening. She had to leave work at noon. And she was fired the next day.

Q. What do you mean -- strike that,

Did you inquire of her as to what she meant when she said she had become panicked?

MR. SILVESTRI: Objection to the form of the question.

THE WITNESS: Well, I knew what she meant. She knows what the symptoms of a panic attack are. She didn't have to explain it to me, That includes extreme fear, rapid heartbeat, a conviction that you're going to either pass out or die. It's the most extreme form of anxiety that we know.

During that same visit, towards the end, I essentially said to her that this was bound to happen, that she had experienced other abusive relationships and that they all ended sooner or later, But then I told her that, despite her anxiety talking about this situation, that she needed to talk about it in order to get rid of the

extreme anxiety she was having.

BY MR. POCHUCHA:

Q. And can you describe her condition on that

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OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

PATRICIA B. BURNS,

Petitioner,

v.

UNINET, INCORPORATED, and SOUTHEASTERN COMPUTER CONSULTANTS, INC.,

Respondents.

ON PETITION FOR *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX (VOLUME II OF II) TO PETITION FOR *WRIT* OF *CERTIORARI*

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA B. BURNS,
Plaintiff,
-vs- C.A. No. 98-382-A

JOHN E. BJORN, et al.,
Defendants.

TRIAL TRANSCRIPT

December 10, 1998

Before: Claude M. Hilton, Judge

APPEARANCES:

Larry A. Pochucha, Counsel for the Plaintiff

Stephen Silvestri and David Ervin, Counsel for Defendants

THE CLERK: Civil Action 98-382-A, Patricia B. Burns versus John E. Bjorn, et al. This case comes on for trial by the Court.

Are counsel ready?

MR. POCHUCHA: Plaintiff is ready.

MR. SILVESTRI: Defendant is ready, Your Honor.

THE COURT: All right.

MR. POCHUCHA: The rules require that-- I am Larry Pochucha, representing the plaintiff.

I understand the rules require that findings of fact and conclusions of law be brought with us. I had not filed those.

Does the Court require those at this time?

THE COURT: Why don't you hand them forward if you have them.

MR. POCHUCHA: I provided a copy to counsel, Your Honor.

THE COURT: All right. What do we have, two counts going forward this morning?

MR. POCHUCHA: Yes, sir, that is correct, a count of sexual discrimination and retaliation.

THE COURT: All right.

MR. SILVESTRI: Stephen Silvestri for the defendants, Your Honor.

My understanding is that there are only three

counts left in this case. A sexual harassment count for quid pro quo, it is Count 1 of the complaint. A hostile environment sexual harassment count, that is Count 2 of the complaint. The sex discrimination count, Count 3 of the complaint, has already been dismissed on summary judgment by Judge Ellis. And then the third count is the retaliation count.

That's really what we have going forward here today, sir.

MR. POCHUCHA: Your Honor, they are

styled as quid
pro quo and sexual harassment, but we take them--
As I will
indicate to the Court in the opening statement when
permitted
to make same, Ms. Burns takes the position that
those, as
stated now, that those terms are really of little use in
this
case, that it is basically a question of action visited
upon
her because of her sex.
The disparate treatment is what was excluded
by
Judge Ellis and thrown out. And so, I would submit
to the
Court that the Court's characterization of two counts
is
essentially what we are proceeding on.
THE COURT: Well, Count 3 was the count
that
alleged sexual harassment, right?
MR. POCHUCHA: Your Honor, may I
obtain my
pleadings?
THE COURT: All right.

MR. SILVESTRI: Judge, it was Count 1 and 2 was sexual harassment. Count 3 was sex discrimination.

MR. POCHUCHA: My understanding from the Court's ruling, Your Honor, was that the count that was in the nature-- Yeah, it was titled sex discrimination in the nature of disparate treatment, is what has been excluded.

THE COURT: That is what has been dismissed?

MR. POCHUCHA: Yes, sir.

THE COURT: All right, go ahead. Give me a quick-- I have looked at the file, so give me a quick statement if you want to.

MR. POCHUCHA: Yes, sir, just briefly.

Ms. Burns was employed by UniNet for two distinct periods of time. The first from December of '90 through August of '92. And the second from October of '93 until March 10 of '95 when she was terminated.

During her first period of employment Mr. John Bjorn, who was then president of the corporation, engaged in flirtatious conduct with her, provided extraordinary assistance to her for a period of time, made it obvious that he was interested in becoming involved in a romantic relationship with her.

The time that he spent with her at the office was so extreme that she was fearful that others would believe that those two were involved in some sort of romantic affair,

5

which they were not. Constantly asked her to go to drinks.

Finally she consented. There was a practice in this office of UniNet at that time, and this is the first time period, Your Honor, where employees went for drinks, Happy Hours on a regular basis. Ms. Burns finally consented because she had been asked so many times, and it was somewhat

awkward for the president of the corporation, a person of that authority, to ask and to refuse so much.

She went. The only two people that showed up were she and Mr. Bjorn. She explained to Mr. Bjorn during those-- She stayed. They had a few drinks each. Mr. Bjorn took the conversation towards matters of a personal nature. She would try to keep them at business, but was unsuccessful.

She let him know at that meeting in no uncertain terms that she was not interested in any relationship, that she had a child to raise, that she was involved in another relationship.

And from that time forward, Your Honor, Mr. Bjorn reversed his treatment of her, withdrew the sales assistance that he formerly had provided to her, not only the excessive amount, but any whatsoever, and caused her life to

be quite
23 miserable at UniNet, berated her in public, held back her
24 sales orders. She was a salesperson of computers for UniNet,
25 Inc.

1 She brought this to the attention of Todd
2 Heidelberger, her sales manager at the time. And no
3 corrective action was taken. It had an adverse impact upon
4 her health. And she resigned her employment there in August
5 of '92, not taking any actions at that point in time.
6 In October, in the summer of 1993 Mr. Heidelberger,
7 who had been her sales manager, called her back, suggested
8 that they, UniNet, which had been operating out of Herndon,
9 Virginia, opened a new office in Frederick, Maryland and that
10 she might consider returning to that position.
11 And if she did so, that Mr. Heidelberger would
12 shield her from Mr. Bjorn, that she would need have

no
13 contact with him, that she would have unlimited territories
14 other than Northern Virginia, and that one of her major
15 accounts, Loudoun Hospital, which she had acquired for the
16 corporation, would be returned to Ms. Burns should he ever
17 leave.
18 And so, she commenced employment there in October
19 of '93. And things went fine until March of '94 at which
20 time Mr. Heidelberger found another job and left and Mr.
21 Bjorn became her acting manager of that location as well.
22 Shortly after that period of time he approached her while she
23 was alone at the copy machine, advised her that he was
24 separated, expressed his disappointment at not being able to
25 find a woman who could boil a pot of water. The same sort of

innuendos were made towards her. She excused herself, told him that she thought certainly he would find someone. And the adverse treatment toward her commenced anew.

And the adverse treatment consisted of holding back her sales orders, reprioritizing them so that when she placed an order, she couldn't get it delivered to her customers on time. Other salesmen's orders were placed in advance of hers. There were also public beratings for no reason at all. And it really made it difficult for her to operate.

In May of that year a new sales manager was hired, a Miss Pam Edelman. Things didn't get much better for Ms. Burns. She continued to try to improve her sales through memorandums to the president and to her manager, but that didn't seem to help matters.

She asked for an increase of a ramp-up salary in October of 1994. Her direct supervisor-- She had received one such increase. Her direct supervisor denied that. She submitted it to Mr. Bjorn. Mr. Bjorn didn't respond. She submitted it to the owner of the company. She was not provided with a meeting with the owner of UniNet, but the president of Southeastern Computer Consultants, Inc. met with her and denied her request.

And I should mention, Your Honor, that the two defendants in this case are UniNet, Inc. and Southeastern Computer Consultants, Inc., and they bear a distinct

relationship to one another. The employee handbook, which has been provided as an exhibit in the motion for summary

judgment, which we expect to tender as an exhibit in this case, reveals that the chain of authority from UniNet goes to Southeastern Computer Consultants, Inc. And there are numerous matters of financial and hiring authority which Southeastern Computer Consultants exercises authority over UniNet, Inc. on.

The treatment of Ms. Burns continued. There was an especially difficult meeting in November of 1994 between Mr. Bjorn and the management at the Frederick, Maryland office where there was a heated exchange between Ms. Burns and Mr. Bjorn. She advised Mr. Bjorn that the orders for computers were being delayed intentionally. He denied that, berated her.

There were three salesmen there at that time, and all of them were participating in the meeting, but Mr. Bjorn

singled out Ms. Burns for severe criticism and suggested that he would do a study of the orders.

He did a study of the orders. He said that they indicated there was a day's difference between the shipment of orders at Frederick, Maryland and those at Herndon. However, if you-- Those are before the Court as well, and you can see there will be a five-day delay.

The inability of Ms. Burns to continue with her job

continued. She wrote a memorandum to the corporation on or about November 23 and met with Miss Lorie Morrell of Southeastern Computer Consultants, Mr. Ed Bjorn, and Pam Edelman, her manager. She advised them of the harassment that she had received from Mr. Bjorn.

The meeting was not satisfactory to her at all.

They left Ms. Burns with little hope that there would be any correction in the situation.

On November 28 she filed an EEOC complaint alleging sexual harassment.

Following the filing of the EEOC complaint, within a week, on approximately December 1 or 2, the entire procedures in the Frederick, Maryland office were changed.

Mr. Ed Bjorn, who is John Bjorn's father, John Bjorn being the president of UniNet. Ed Bjorn was the president of Southeastern Computer Consultants, Inc. Leo Harris is the major stockholder in both of those corporations. And in any event, Ed Bjorn wrote a memo to the file tightening up all the procedures in the Frederick, Maryland office.

From that point forward, Ms. Burns was treated in a manner totally distinct from any other individual within

either UniNet Corporation or the Southeastern Computer Consultants, Inc. corporation.

Mr. Bjorn from that moment forward, regardless of their conclusion of any investigation, was advised not to

have any authority over Ms. Burns at any point in time or even, it appears, to assist her in her sales endeavors. And this was a fairly small corporation of computer sales individuals, sales and service, and there were times that you needed the president to come in. The president was the person who can tell you, you can cut this deal, or you could cut that deal. Ms. Burns was excluded from having that opportunity.

Things did not get better for her there. In February the management was changed at the Frederick, Maryland office. The management was changed

from a woman by
12 the name of Pam Edelman, who we expect you will hear from
13 today, to a gentleman by the name of John Lyons, who
14 ultimately fired Ms. Burns.
15 Now, the president of the corporation has testified
16 that he doesn't know how that management shift took place.
17 The chairmen of the Board of both UniNet and Southeastern
18 Computer Consultants both say they don't know how this
19 management change took place. And nevertheless it did.
20 And at approximately-- Within about three weeks
21 Ms. Burns' sales had picked up some because the manager, Mr.
22 John Lyons, who had been sent in, had a close relationship
23 with Mr. Bjorn and had previously been the sales manager at
24 the Herndon office. At the end of February he gave Ms. Burns
25 a glowing report, said that your performance has

been very

11

1 good, wonderful. She asked for a written copy of it. He
2 said he couldn't provide that to her.
3 On March 7 she heard from her major customer,
4 Loudoun Hospital, that Mr. John Bjorn was going to make a
5 call there to talk to them about past due payments and their
6 history of late payments.
7 Well, at that point in time Ms. Burns had worked

8 very hard to get Loudoun Hospital current in its payments,
9 and it was in fact not behind in its payments. And she was
10 very concerned with that. Advised Mr. Bjorn. He said he was
11 going to go anyhow for that purpose.
12 She advised Leo Harris, the owner of the
13 corporation. He made a visit to her and said, well, he is
14 not going for that reason. He is going on a goodwill visit,

and he is going because, you know, at times our salespeople leave, and we don't have a personal relationship with those individuals.

At the same time an improper deduction was made from Ms. Burns' check. She wrote a memo to Mr. Bjorn and to Mr. Harris saying, look, I am having a panic attack this day. This idea of you going to Loudoun Hospital and interfering with my major source of income is too much for me to take, it has affected my morale.

And she-- I would add that Ms. Burns has had an anxiety condition, and she has been under treatment

periodically for that condition since as early as 1985. She goes pretty much as on an as-needed basis to Dr. Charles Titus.

Dr. Titus is unable to be here today. Counsel consented to his have de bene esse deposition taken on Monday. He may be available for rebuttal should the matter go longer than today.

In any event, she couldn't physically remain at work and left and wrote the memorandum. It was lunchtime, and there was no manager there.

When she returned the next day, she was advised by Mr. Lyons that she was terminated for leaving work early.

There was a written policy in effect that required individuals to be placed on probation. She was the top sales producer at the Frederick, Maryland office at that point in time. And then, Your Honor, we would submit that the evidence will show there was no legitimate business reason for that termination.

And I would add, finally, that Mr. Bjorn's flirtatious behavior towards Ms. Burns to encourage her to

21 enter into some type of romantic relationship and then his
22 harsh treatment of her and harassment following that
23 rejection of those flirtations, is a pattern of conduct which
24 occurred with at least two other women, both of whom will
25 testify, Miss Maureen Schaeffer Kearns as well as Sue Foreman

1 Temple.
2 We would also allege that there was a third
3 individual with whom he engaged in the same sort of conduct.
4 With that individual the flirtatious behavior was apparently

5 not unwanted, and that is Miss Laura Brooks, who started as
6 an employee at UniNet, rose to a senior sales representative,
7 and is now Mrs. Bjorn, Your Honor.
8 So, that's basically it.
9 THE COURT: All right.
10 MR. SILVESTRI: Your Honor, defendants have a quite
11 different view of this case. To summarize it very

briefly,
12 the case has no sex in it. I listened to Mr. Pochucha for
13 the time he spoke to you, and I didn't hear a single word of
14 disparate treatment come out of his mouth. I heard
15 flirtatious, and I heard retribution, but I didn't hear a
16 single word of disparate treatment.
17 So, the first thing from the defense point of view
18 in terms of opening statement for the Court to know is that
19 there is no sex in this case. There is no sexual harassment
20 as that term has been traditionally defined by this court and
21 by other courts. There is no hostile environment as that

22 term has been traditionally defined by this court and other
23 courts.
24 What we have here is a harassment case. And the
25 question is who was harassing who. And the memos that Mr.

Pochucha referred to are not just a few memos that are cover-your-behind memos. The memos are more than 20 memos that the plaintiff prepared after it became clear to her that her second request for a guaranteed salary wasn't going to get approved.

And those memos attack everybody and everything at UniNet, every policy that applied to her as well as everybody else, and her supervisors, from Pam Edelman, a woman, to John Lyons, a man who replaced her, to Mr. Bjorn, who is sitting here to my second left.

And the memos and the telephone calls came almost on a daily basis. You will hear evidence from the defendants that they disrupted the operations of the defendants. You will hear that there was very little contact whatsoever

during the point in time when Ms. Burns voluntarily returned to UniNet, to this atmosphere, she says, of flirtation, to the time that she was discharged between her and Mr. Bjorn.

You will also hear from witnesses on both sides that the rules were applied equally and that the policies were applied equally. And that Mr. Bjorn got upset equally at men and women.

You will hear that the plaintiff blamed everybody for her failing sales. The memo that Mr. Pochucha mentioned that came on March 9, not March 7, but March 9, 1995, was a memo from Ms. Burns. It didn't say, I am having a panic

attack. It said that you are-- You are not being fair to me in terms of allowing the president of the company to go to a leading customer. You took $51 away from me.

And you are
4 otherwise interfering with my customers. And I cannot do my
5 job. Therefore, I must leave the office.
6 You will hear testimony, sir, from the chairman of
7 the Board of UniNet, who is also the chairman of the Board of
8 SCCI, a man named Leo Harris, who made the decision to
9 discharge Ms. Burns. It wasn't anybody else in the
10 organization. It was Mr. Harris.
11 And he will tell you that from the time he became
12 involved in the situation back in November when Ms. Burns
13 filed her charge of harassment, which is the first time,
14 first time in all the history of Ms. Burns' employment, sir,
15 that she even claimed that the treatment was based on sex.

16 She went from December of 1990 through November of 1994
17 before she even said it was sex discrimination and sexual
18 harassment. There isn't a word in the record and not

a word
from the witnesses that she ever claimed she was being
treated differently because of her sex.
First, she claimed that the office that she was employed in, the Frederick office, was being treated differently. And she tried to get Mr. Bjorn to acknowledge
that in a meeting where she brought a tape recorder in,
unbeknownst to everybody else, to get him to say that the

Frederick office was being a second-class citizen.
And after that, when that didn't work, she filed a
memorandum with Mr. Bjorn's superiors, Mr. Harris, that said
that Mr. Bjorn was harassing. When that didn't work, she
went to the EEOC.
So, we have a situation here where the Court really
has to uncover who is harassing who.
One final word, Your Honor, before we go

through
this. Mr. Pochucha mentioned Dr. Titus as an expert witness. I agreed to and consented to on Monday, even though it was last minute, take a de bene esse deposition of him. I did not agree that we would go through with his testimony at trial if he became available. I thought that was a wasteful amount of time, and our position is going to be that we are going to object to Dr. Titus testifying as an witness. Since we have his deposition, it can be read into the record, or the Court can read it.

The last word from the defense, Your Honor, is that one month after the discharge, Ms. Burns wrote to her doctor and said, I am ready, willing and able to perform work, I want to get back into the workplace. And her doctor cleared her for return to work at that point in time.

She spent the next four or five months

rejecting
24 two job offers and not looking for work. She found work in
25 August of 1995, the year she was discharged, making more

1 money than she made at UniNet. Got into a pay dispute with
2 that employer. Says she was terminated from them, and filed
3 a discrimination charge against them. And that was December
4 of 1997, sir.
5 And since that time she has failed and just refused
6 to look for work.
7 So, it is not an off-and-on, off-again-and-on-again
8 thing, as Mr. Pochucha said. It's a plaintiff who was fired
9 by UniNet, got clearance to work a month later, and has since
10 done nothing except for getting one job and accusing them of
11 discrimination, of maintaining a set of interim

earnings.

SCCI and UniNet are separate corporations. The memo that Mr. Pochucha identified in his opening statement was a memo constructed in the event of Mr. Harris' illness, and you will hear from him. The memo never went into effect.

Ms. Burns has claimed throughout this case that Mr. Bjorn, John Bjorn, controlled everything at UniNet and that he was president of UniNet and he maneuvered the strings with respect to the customers. And so, that position is entirely inconsistent with Mr. Pochucha's claim that these two organizations are one organization.

Thank you, sir.

THE COURT: All right. Who is your first witness?

MR. POCHUCHA: Your Honor, I would move to separate

the witnesses.

THE COURT: If there are any persons in the courtroom who are going to testify in this case, go in the rear of the courtroom into the witness rooms until such time as you are called.

MR. SILVESTRI: Your Honor, I have a preliminary matter. The defendants have moved to strike the subpoena to Laura Bjorn, who is Mr. Bjorn's wife, on the grounds that she has had entirely-- The issues, she has had one conversation with Ms. Burns. And there is no testimony in the record with respect to Ms. Bjorn's involvement in this case at all.

Obviously, she is married to John Bjorn, and obviously she worked at UniNet. And we have moved to have her released from the subpoena.

Now, she is sitting here in the courtroom, and that is part of our motion in limine. There were motions in

limine. That was one part of it.

So, if the Court intends to rule on that later, then we will have her leave the room.

THE COURT: Let me hear from the other side.

MR. POCHUCHA: Your Honor, as we indicated in our opening, our purpose for calling Mrs. Bjorn is to elicit testimony regarding the pattern of conduct of Mr. Bjorn and their relationship and the manner in which their relationship commenced, as well as--

THE COURT: All right. Your motion to quash will be denied.

NOTE: The witnesses in the case are excluded from the courtroom.

MR. POCHUCHA: Your Honor, may I address one other matter?

THE COURT: Yes.

MR. POCHUCHA: Mr. Bjorn is no longer employed by either UniNet or SCCI. His presence at counsel-- And he is not a party to the case because he has been dismissed.

I don't know what the theory is of his presence at counsel table and his exception--

THE COURT: All right. What is your theory?

MR. SILVESTRI: Two things, Your Honor.

In anticipation that Mr. Pochucha might have an objection like that, I researched the issue about whether or not there is any constraints on the designation of corporate representatives. And there are none that I could find.

THE COURT: Well, are you designating him as your representative?

MR. SILVESTRI: I am designating Mr. Bjorn as the corporate representative of UniNet. He is the former president of UniNet.

THE COURT: All right. You may do so. He was certainly a corporate officer at the time that these events

occurred.

MR. SILVESTRI: Thank you.

THE COURT: All right. Call your first witness.

MR. POCHUCHA: Todd Heidelberger, Your Honor.

NOTE: The witness is sworn.

TODD HEIDELBERGER, called by counsel for the plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Mr. Heidelberger, would you identify yourself for the Court, please.

A Todd Heidelberger.

Q And what is your residence address, sir?

A Route 1, Box 2485, Berryville, Virginia.

Q And your current place of employment?

A Aid Association for Lutherans.

Q And what is the nature of your occupation

there?

A I sell insurance.

Q All right. You were formerly employed at UniNet?

A I was.

Q Tell the Court just briefly how you came to know John Bjorn.

A I originally came to work for John Bjorn at Thompson Systems, answering an ad through the paper. It was

my first job out of college. I was hired by John.

Q At Thompson Systems?

A Right. And then I was also hired by John over at UniNet about two years later.

Q At what time were you hired by John?

When you say John, you are referring to John Bjorn?

A That's right.

Q Do you recall the date that you were hired by him or year?

A September of '91.
Q All right. And in what capacity were you hired?
A As a sales rep.
Q And did you continue as a sales rep?
A I was a sales rep for a period of time, and then became a sales manager.
Q All right. And what is your-- Do you have knowledge of the relationship between Southeastern Computer Consultants and UniNet, Inc.?
A Yes. My understanding was that Southeastern owned UniNet.
MR. SILVESTRI: Objection, opinion, Your Honor.
THE COURT: Objection overruled.
BY MR. POCHUCHA: (Continuing)
Q Are you familiar with Patricia Burns?
A Yes, I am.

Q How do you know her?

A Pat worked at UniNet while I was there as a sales rep, and then I was also her manager at UniNet.

Q Would you describe for the Court the type of employee she was while she was under your management at UniNet during the first term of employment?

A Pat was a great employee. She brought in a lot of business, selling computers, networking services. Showed up on time, responsible.

Q All right. Did you have opportunity to provide directions to her as a sales manager and she being a salesperson?

A Yes.

Q Did she follow those directions?

A Yes.

Q Did there come a point in time when Ms. Burns addressed some concerns with Mr. Bjorn with you?

A Yes.

Q Describe that to the Court if you would, please.

A Pat had come to me and said that she felt that John

was emotionally harassing her. And that she, she just didn't feel that she could work comfortably with, you know, the situation as it was.

Q Do you recall any of the specific incidents that she related to you that comprised the harassment?

A I think she felt that he was riding her or, you know--

MR. SILVESTRI: Objection, perception, Your Honor. He is testifying to Ms. Burns' feelings.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Would you describe Ms. Burns' demeanor at the time that she give those descriptions to you?

A Yes. She was upset, shaken.

Q All right. And what, if anything, did you do in response to receiving that information from Ms. Burns?

A Right after that I went to John directly, sat

down
13 with him and told him of Pat's complaints. And that's what I
14 did.
15 Q And what, if any, response did he make to you?
16 A John-- I had offered to sit in on a meeting with
17 John and Pat to, you know, see if they could work everything
18 out. He said that wouldn't be necessary, that he would meet
19 with her. And that's what they did the same day.
20 Q All right, sir. And did you make any written
21 record of your meeting with Ms. Burns?
22 A I had made some notes, yes, in a spiral bound
23 notebook.
24 Q What did you do with those notes?
25 A I put them in Pat's file.

1 Q Have you seen them since then?
2 A No.
3 Q After your conversation with Ms. Burns and

her
4 meeting with Mr. Bjorn, did Ms. Burns ever address that
5 subject with you again during her first term of employment?
6 A Yes. Pat had said that she, before she left, she
7 felt that she was still, you know, she was uncomfortable.

8 MR. SILVESTRI: Objection, Your Honor. If he is
9 testifying to her feelings, then it is still perception.
10 MR. POCHUCHA: I withdraw it.
11 THE COURT: All right.
12 BY MR. POCHUCHA: (Continuing)
13 Q Tell the Court what Ms. Burns told you after that
14 meeting about her--
15 A Well, after the meeting she had with John, my
16 recollection is that she said, you know, we worked things out
17 and we will see how it will go. Hopefully things were
18 settled.
19 Then she left UniNet six months later maybe. And

at the time that she had left, I was aware that she had left-- One of the reasons was that she was, she felt that she was uncomfortable working with John again.

MR. SILVESTRI: Objection, Your Honor. I am hearing this witness testify that he was aware. I'm not hearing what Ms. Burns said.

THE COURT: Objection sustained to opinions. You may testify to what she told you, but not your opinions.

THE WITNESS: It is difficult for me to remember exactly what she told me. It was, you know, long ago. So--

BY MR. POCHUCHA: (Continuing)

Q All right, sir. Did you have any conversations with anyone else at UniNet or SCCI about the concerns that

Ms. Burns had expressed to you?
A No.
Q Did you ever talk to Leo Harris about the reasons for Ms. Burns' termination at UniNet during her first term of employment?
MR. SILVESTRI: Objection, asked and answered already.
THE COURT: Objection overruled.
A Leo had asked me if I knew why. And what I told him was that she, only that she had gotten a job with her fiancee at the time.
Q Was there any reason that you didn't tell him about what she had told you?
MR. SILVESTRI: Objection, relevance.
THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q Describe for the Court just briefly how a salesperson placed orders during the first term of

employment.

A A salesperson would call up the vendors and place the orders over the phone issuing a purchase order.

Q Did that ever change during your employment with UniNet?

A I believe there was a time that John was placing orders, yes. So, it did change.

Q All right, sir. Who was responsible for the hiring and firing of personnel during Ms. Burns' first term of employment at UniNet?

A Ultimately John. But if I recommended or if I felt that someone, you know, wasn't doing good, then I would discuss that with him, and we would make a decision on that.

Q And was John the-- Did John Bjorn allow you autonomy as a manager, or was he the sort of president who would require to have his say on most any subject?

MR. SILVESTRI: Objection to the form of

the
question. Compound question, Your Honor.
THE COURT: Objection overruled.
A His say was required--
Q All right.
A --on hiring or firing.
Q And did there come a time subsequent to Ms. Burns' departure from employment that you had occasion to speak with her again?

A Yes.
Q Describe those circumstances to the Court, if you would.
A After Pat had left, I was subsequently transferred or had moved, was offered a position at a new office in Frederick. And Pat, working for the printing company, would come by and visit. And I had asked her, you know, if we

could use their services. And so, that's when I originally started talking to her again.

Q All right. Did there come a time when you had a talk to her about anything other than using the services of the company that she was working for?

A I asked her if she would be willing, she was welcome back at UniNet as an employee.

Q And what was her response-- Strike that. At what point in time was that, do you recall?

A It was when I was working at Frederick as a manager of the Frederick office. The exact date I don't recall.

Q Summer of '93 fair?

A That's fair.

Q What response, if any, did Ms. Burns make to you in regard to your statements to her about--

A Pat was interested but hesitant to come back because of her concerns regarding treatment from John.

Q Was that the only discussion that you ever had with

her about returning?

A No. She was delivering printing supplies, I don't know how many times, but on occasion. And when she would come, I would say, have you thought any further about coming back.

Q Did there come a point in time when you and she reached an agreement about her return to UniNet?

A Yes.

Q Describe that for the Court, please.

A She-- I mean, the offer was out there. It was kind of an open-ended offer--

Q What was the offer?

A To come back and work as a sales representative in the Frederick office.

Q Were there any particular terms that you recall?

A No. Other than you would be selling local area networking services, hardware and so forth.

So, she could-- I don't recall exactly, you know, when, but she came, was in the office, I suppose. And I said, you know, the offer still stands. And I guess-- I don't remember exact specifics, but she said, you know, I'll take it.

Q Was this at the Herndon office or the Frederick office?

A Frederick.

T. Heidelberger - Direct

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Q And were there any stipulations made by either of you regarding her return to employment?

A No. Pat had expressed that the one hesitation she had was that she would be in contact with John. And I had indicated to her that John was rarely in the Frederick office and that most business relating to John or relating to

UniNet

in Herndon went through me. So, she wouldn't have much occasion to work with him.

Q What was the territory that the Frederick office served at that point in time?

A It was the Frederick area, the 270 corridor to Washington, D.C.

Q Was there any discussion with Ms. Burns about what territory she would be working?

A No. It was all open territory.

Q All open territory?

A That's right.

Q Tell the Court what that means basically.

A Open territory means there are no boundaries, that a sales rep has the ability to sell in whatever general area we are working in.

Q And do you recall a point in time when Pat actually returned to the employment of UniNet?

A Yes, she did.

Q All right. And who was her manager when she

returned?

A I was her manager.

Q And that was at the Frederick office?

A That's right.

Q And how long did you remain her manager?

A Six months, I suppose.

Q That's until you departed, correct?

A That's right.

Q And would you describe her performance as an employee under your management?

A She was prompt, on time. You know, did her job.

I don't remember exactly what her sales performance was in terms of her numbers.

Q How did you get along with her?

A Great.

Q How did the other people in the office get along with her?

A They got along very well with her.

Q Do you recall what her ramp-up salary was?
A I don't.
Q Describe for the Court just briefly what a ramp-up salary is in the computer industry.
A A ramp-up salary-- I don't remember exactly what the terms of her salary were, so I couldn't say.
Q That's fine. Well, would a person start at the

same salary-- Well, let's go back just a second.
When she returned for the second term of employment, what were the terms of compensation for a person in her position?
A I don't know.
Q I mean, was it a base salary and commission or straight commission? Do you remember any of that?
A I believe it was a base salary and commission.
Q All right. And would the base salary have been elevated during a person's initial six months and then reduced?

A It could have been, yes.
MR. SILVESTRI: Objection to the form of the question, Your Honor, hypothetical.
THE COURT: Objection sustained. He said he didn't know already.
MR. POCHUCHA: Yes, sir.
THE WITNESS: I don't recall.
BY MR. POCHUCHA: (Continuing)
Q Prior to rehiring Ms. Burns, did you have any discussions with Mr. Bjorn about rehiring her?
A Yes.
Q And tell the Court what he told you, if anything.
A He said it would be fine to hire her, that she had done a good job previously.

T. Heidelberger - Direct

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Q Did you have any discussions with Leo Harris prior to--
A Yes. Leo said great, he would be happy to have Pat

back.

Q All right. There came a point in time when you advised Ms. Burns that you were moving on to another job?

A That's right.

Q Did she make any requests of you before you departed?

A No, not that I recall.

Q All right. Did she ask you to speak with anyone?

MR. SILVESTRI: Objection, already asked and answered. That's a request.

THE COURT: Objection overruled.

A I don't believe so.

Q All right. Did she express any fear to you about the possibility of John Bjorn resuming supervision over her?

MR. SILVESTRI: Objection, leading.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Did she express-- Did she make any statements to you about her relationship with John Bjorn in your absence?

MR. SILVESTRI: Objection, leading.

THE COURT: Objection overruled.

A She said that she was concerned that she was going

to be managed by John again directly. That was a concern that she had.

Q What did you tell her, if anything?

A I didn't tell her anything. That is just how she felt. What could I say?

Q Do you know who took over as her supervisor upon your departure?

A I don't. I am sorry, I believe John. I don't know his last name. I know it, but I can't remember it.

Q While you were manager at the Frederick, Maryland office, did you ever have any discussions with Mr. Bjorn about territories, setting territories or changing territories, anything of that nature?

A We had talked about eventually having, you know, defined territories. When I had left UniNet in Herndon, we originally had said, well, you know, we will have some defined territories. But we never worked that out.

And while I was at, in the Frederick office, we didn't have any further discussions regarding defined territories.

Q As a sales manager, were you strictly managing, or were you managing and selling?

A I was managing and selling.

Q Let me direct you back to the first term of employment and ask you about a lady by the name of Maureen

Schaeffer Kearns.

Are you familiar with her?

A Yes.

Q Do you know how she came to be hired at UniNet?

A I think she was a temporary. She was a temporary and then was hired on full time.

Q Do you know who hired her?

A I suppose John.

MR. SILVESTRI: Objection, guessing, Your Honor.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Were you ever Ms. Kearns' supervisor or manager?

A No.

Q Did you ever accompany Ms. Kearns on any sales calls?

A Yes.

Q All right. Did you accompany her on a sales call to Sallie Mae? Do you recall that?

A I don't recall.

Q Do you recall an occasion on which you were to accompany both Ms. Kearns and Mr. Bjorn on a sales call?

A No, I don't.

Q During Ms. Burns' first term of employment, what was the training that was afforded to a new

salesperson?

A We didn't have any formal training program.

Q Whose duty, if anyone, was it to go on sales calls with new salespeople?

A It would have been John's or mine. And for the most part people went with John.

Q And how long was that to last, that John would attend these sales calls?

A As long as the sales call lasted. If it was a two-hour sales call--

Q How many, how long in terms of duration from the point of time of the person's commencement of employment to their development as an employee? Or was there any standard?

MR. SILVESTRI: Objection to the form of the question, Your Honor. It is a timing question that

assumes
14 that there was some time.
15 THE COURT: Objection overruled.
16 A Could you ask me that question again?
17 Q Right. I am trying to determine if there was a
18 period of time for which it was standard for Mr. Bjorn to
19 accompany an individual on sales calls.
20 A No. He was available to go on sales calls for the
21 most part unless he had other, you know, arrangements or
22 commitments.
23 Q During that first term of employment there where
24 you were a manager, were there any other managers?
25 A Donna Gavitt was a manager also.

1 Q And how was it determined whether you would go on a
2 sales call with the sales rep, Donna Gavitt would go on a

sales call with the sales rep or John Bjorn would go on a sales call with the sales rep?

A Donna typically went on sales calls for maintenance sales. She was in charge of maintenance sales. And John and I went on sales calls when we were requested.

It wasn't determined that you would do this and I would do this. It was just as requested.

Q When you were requested by the salesperson or someone else?

A By the salesperson.

Q Would it be usual or unusual for you or John to suggest that you yourself go on the sales call rather than having the request come from the salesperson?

A It would be unusual.

MR. POCHUCHA: May I consult with Ms. Burns, Your Honor?

THE COURT: Quickly.

BY MR. POCHUCHA: (Continuing)

Q Were you familiar with Ms. Burns'

relationship with
22 Leo Harris during either the first or second period of her
23 employment, if she had such a relationship, any relationship?
24 A I was.
25 Q Would you describe that for the Court, please.

1 A Very friendly and comfortable with each other. No
2 animosity or anything like that.
3 Q The services that either you provided or Mr. Bjorn
4 provided on accompanying a salesperson on a call, were those
5 provided both in the early period of a salesperson's career
6 and on occasion later on in a salesperson's career?
7 A Yes.
8 Q What was the need for a manager or a president to
9 go on a sales call? Describe that for the Court if you
10 could.

A If you wanted to impress a client and have a better showing, rather than just having one person or having a front line sales rep, then it would be nice to have a manager with you.

Also in John's case, he had a better technical knowledge, much better technical knowledge than the rest of the sales staff regarding networking and so forth.

So, they would ask him if it was going to be more of a technical sale.

Q Did individual salespeople have the same authority to reduce margins or prices that the president or sales managers did?

A On a small scale, I would say yes. If it was a large deal, then we would go to John, and he would-- We would ask him, Can we cut this three points or two points.

Q Is that or is that not another benefit to have John on a sales call?

MR. SILVESTRI: Objection to the form of the question, leading.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Did you ever have John go on a sales call with you for the purpose of having his authority to cut a better deal?

A No. We normally didn't cut deals at a point of sale. It was done back in the office.

Q Come back to the office?

A That's right.

MR. POCHUCHA: Thank you, Your Honor. That's all the questions I have.

THE COURT: All right, cross-examine.

MR. SILVESTRI: Thank you.

CROSS-EXAMINATION

BY MR. SILVESTRI:

Q Good morning, Mr. Heidelberger. How are you today?

A Good.

22 Q Isn't it true that during periods of employment

23 with Ms. Burns, you commuted with her to the office once a

24 week?

25 A I couldn't say that that was true.

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1 Q Could you get me Mr. Heidelberger's deposition,

2 please?

3 Judge, do you require us to use the original?

4 THE COURT: No. Read the question and the answer

5 and ask him if he said it.

6 MR. SILVESTRI: Do you want me to show it to the

7 witness first?

8 THE COURT: No.

9 I can't wait for you to find it. If you are going

10 to--

11 BY MR. SILVESTRI: (Continuing)

12 Q Okay. Page 118, question-- Well, answer: Yes, I

13 did commute with her as a matter of fact.

MR. POCHUCHA: Well, Your Honor, I believe the

proper way is to provide a question at least.

MR. SILVESTRI: All right. Well, let me go back

and get the question, please, Your Honor.

THE COURT: Read the question and read the answer

and ask him if that's what he said.

BY MR. SILVESTRI: (Continuing)

Q Question: All right. Did you have occasion from

time to time while you were employed by UniNet and while Ms.

Burns was employed by UniNet to commute together to work?

Answer: I don't believe so. Maybe once in a snowstorm.

Question: That's the only occasion you recall?

Answer: You are talking to work in Frederick, correct?

Question: Well-- Answer: Yes, I did commute with

her as a matter of fact.

Is that your testimony, sir?

A Yes.

Q And during the time period when you commuted to work with Ms. Burns, she never discussed with you sexual harassment, did she?

A No, she did not.

Q In fact, she never discussed with you the term sexual harassment, did she?

A No, she didn't.

Q Is that a no?

A Yes.

Q And during your employment there at UniNet, isn't it true, sir, that men and women were placed on probation?

A Yes.

Q And that women were promoted?

A Yes.

Q And that men were promoted?

A Yes.

Q And that women and men were fired?

A Yes.

Q And that men and women were hired in sales

25 capacities?

1 A Yes.
2 Q And isn't it true that Mr. Bjorn took the same tone
3 in his criticisms with men as with women?
4 A Yes.
5 Q And isn't it true that Mr. Bjorn belittled you in
6 your position there?
7 A Yes.
8 Q And that you were belittled in the same manner as
9 Ms. Burns was belittled?
10 MR. POCHUCHA: I would object, Your Honor. Calls
11 for a conclusion on the part of the witness.
12 A I don't believe so.
13 THE COURT: Objection overruled.
14 BY MR. SILVESTRI: (Continuing)
15 Q At page 101 of your deposition did you say,
16 question: The belittling, that term that you used this
17 morning in response from Ms. Burns' counsel, do you feel that
18 you were also belittled? Answer: At times, yes.

Question: In the same manner in which Mr. Bjorn was belittling Ms. Burns? Answer: Yes.
Did you testify to that at your deposition?
A Yes.
Q So, which is the true version, that or this one?
A Whether John belittled me in the same way?
Q Yeah.

T. Heidelberger - Cross

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A I mean, John belittled me, but I don't know if it was to the same extent that he did with Pat.
Q Your testimony back at your deposition was that he belittled you in the same manner as he belittled Ms. Burns, is that correct?
A Yes.
Q Your testimony today is it is different, correct?
A I am trying to think of instances where I can make a distinction.
Q Sir, the question calls for a yes-or-no

answer.

MR. POCHUCHA: Your Honor, I object to that. I don't believe counsel--

THE COURT: Don't argue with the witness. He has answered your question, so move along to something else.

BY MR. SILVESTRI: (Continuing)

Q I didn't get an answer to the last question. Is it yes or no?

A Did John belittle me in the same way as he belittled Pat?

Q I said, is the answer different today? That was the question.

A The answer is not different. He belittled me.

Q In the same manner as he did Ms. Burns, is that correct?

MR. POCHUCHA: Your Honor, I object--

A On occasion, yes.

THE COURT: Objection overruled.

MR. SILVESTRI: No further questions, Your Honor.

THE COURT: All right. Do you have anything further?

MR. POCHUCHA: No, sir, Your Honor.

THE COURT: Thank you. You may step down. You may be excused.

NOTE: The witness stood down.

THE COURT: Who is your next witness?

MR. POCHUCHA: Ms. Maureen Schaeffer Kearns, Your Honor.

She had advised me that she had a doctor's appointment. I would assume she will be here by now though.

NOTE: The witness is sworn.

MAUREEN S. KEARNS, called by counsel for the plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Good morning. Ms. Kearns, would you please identify yourself for the Court.

23 A Yes. I am Maureen Kearns.
24 Q And tell the Court briefly what your educational
25 background is.

M. S. Kearns - Direct

1 A Yes. I have a degree from Radford University in
2 social work.
3 Q And where are you currently employed?
4 A I work at Oracle Corporation.
5 Q What is the nature of your employment there?
6 A It's a direct marketing division. I am a telesales
7 rep for the Oracle Government.
8 Q Did you have occasion to work for UniNet in the
9 past?
10 A Yes, I did.
11 Q Describe for the Court how you came to work for
12 UniNet.
13 A I was working for a temporary agency, and I

was
14 assigned to work at UniNet in approximately October, November
15 of 1990.
16 Q Do you recall how you moved from a temporary
17 position to a permanent position?
18 A Yes. I was working at the temporary company in the
19 hopes of finding a job that more suited my background, a
20 social work background. And Mr. Bjorn asked me if I would
21 consider working there full time.
22 And I at first declined because I was looking for a
23 job in the social work industry, and then I accepted the job.
24 Q Did you have any conversations with Mr. Bjorn about
25 what the job would entail if you accepted it?

1 A I believe we did talk about that. And he did say
2 that there was room for growth. But we didn't talk about

specifics as to what type of growth would be involved.

But basically the duties would entail being a receptionist, you know, opening the mail, and possibly, you know, doing some bookkeeping, accounts payable, accounts receivable.

Q Describe for the Court, if you would, the course of your initial performance as a full-time employee in relation to your contacts with Mr. Bjorn.

A Sure. I started working full time I would say towards the end of November. And when I first started working there, I felt that Mr. Bjorn was very friendly--

MR. SILVESTRI: Objection to the form of the question. We are talking about opinion.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q You can continue, Ms. Kearns.

A Okay. When I first started working there, I felt that Mr. Bjorn was very friendly and just a nice guy, and,

21 you know, I thought this would be a great place to work. He
22 would spend a lot of time in front of my desk, you know,
23 talking to me, I would say flirting with me, you know, paying
24 more attention to me than anybody, any other women in the
25 office.

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1 MR. SILVESTRI: Objection, Your Honor. We have got
2 a narrative here. There is no direct question on this.
3 THE COURT: Well, objection overruled. The
4 question is how did Mr. Bjorn act toward her.
5 BY MR. POCHUCHA: (Continuing)
6 Q You can continue, Ms. Kearns.
7 A Okay. And so-- Where was I? So, he would, you
8 know, spend a lot of time in front of my desk talking to me,
9 flirting with me, paying attention to me, more so than

anybody else in the office.

He would talk about drinking stories. You know, his buddies, his drinking stories, trying to kind of bond with me in that way since I was just out of college. I spent a lot of time--

MR. SILVESTRI: Objection, Your Honor. She just testified to an intent of Mr. Bjorn.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q Did Mr. Bjorn ever ask you to accompany him for drinks?

A Yes.

Q Was that only one occasion or more than one occasion?

A No. He invited me to Happy Hour, and I don't think I ever attended any Happy Hours with him.

Q Were you provided any considerations that

others
were not provided in the office?
A Yes. Due to the fact that Mr. Bjorn liked me, I would ask him occasionally to leave the office early, and he would always let me leave whenever I asked.
And I eventually stopped asking because I felt that there was more to his being friendly. It wasn't just being friendly. I think he really did like me, and I didn't want him to-- I didn't want to give off the impression that I was at all interested in him.
Q All right. Did the conduct that you have just described continue throughout your employment at UniNet?
A It continued for a period of time. And then I recall Pat Burns starting. And I recall there was a shift in attention to Pat Burns. I saw exactly the similar situation. He would stand in front of her desk and flirt with her and do all the same things that he did when I was

there. And I was actually relieved to have that pressure off of me.

Q How was your relationship with-- How would you describe your relationship with Mr. Bjorn at that point in time?

A At that point in time, you know, I was relieved to not be the focus of the attention. And things were relatively, what I would consider relatively normal.

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Things started to change in January of '91 when there was an incident in the office where I was responsible for helping to decide what bills we would pay, and I would, you know, check with Mr. Bjorn and make sure, you know, that we could pay these bills at that time. And I would write the checks out, and then he would sign them.

And one of the duties that that included was writing expense report checks for the different technicians that worked at UniNet. And there was a gentleman there by the name of Mike Stewart who would every month submit expense reports for gas and any other costs incurred during the workday.

And we had just secured them a gas card. And they were using the gas card because we had the receipts from the gas card--

Q Who is them and they?

A Trung Le was another technician that usually accompanied Mike Stewart.

And so, we had the gas receipts from them, but we were still getting the expense reports from Mr. Stewart in the same dollar amount. So-- As the previous months, before they had the gas card.

So, I brought this to Mr. Bjorn's attention saying,

hey, you know, there may be a discrepancy here. I am not sure why we are still getting the expense report for, you

know, $300 and they are using the gas card. We shouldn't be receiving these expense reports. And so, I went to show him the piece of paper.

And he got upset and threw the papers back across the room where I was standing and said, I don't need this shit.

And, you know, at that point I basically said, well, I don't need it either. And I walked out of the office and, you know, took a lunch. And I was crying and upset at this outburst that I didn't feel was warranted in any way.

And I came back to the office and basically told

Mr. Bjorn that I did not want to be treated that way. And that we had talked about my, you know, moving up in the company and that I wanted to, you know, talk about what position I could be moved into, possibly hardware sales. And at that time he said, okay.

And so, we made the decision to move me into hardware sales. And then two days later it was, the decision was made without any discussion with myself that I would be moving into maintenance sales instead of hardware sales, which is a lot harder of a sale being that we were a new company and it was just getting started, the maintenance division.

Q Did you make observations during this period of time of Mr. Bjorn and Ms. Burns other than what you have

described?

A I did also notice that Mr. Bjorn was changing towards Pat. I did notice that he yelled at her. I remember vividly one time being outside of his office door and hearing him yelling at Pat.

And I remember thinking that, you know, nothing, nothing could warrant that. You know, no one deserves to be treated that way in the workplace, it was completely unprofessional.

MR. SILVESTRI: Objection, Your Honor, to the testimonial.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q All right, ma'am.

Describe for the Court briefly, if you would, the conclusion of your term at UniNet.

You were in hardware sales, and then you

went to
18 maintenance sales.
19 A Right.
20 Q Did you have interactions with Mr. Bjorn at
21 maintenance sales?
22 A Very little interaction with him. We did go
on
23 some appointments together. And I actually recall
one
24 specific incident that really bothered me was
specifically we
25 had an appointment with Sallie Mae Corporation,
which I had

1 set up, and they were allowing us to bid on the
maintenance
2 renewal. And this was probably one of the biggest
3 opportunities that UniNet had in front of it, probably
4 definitely the largest opportunity for maintenance
sales at
5 that time.
6 And we were in contention with two other
companies,
7 one of which they had used the previous year and

they were
not happy with. So, it was a big opportunity for UniNet.
I had worked for several weeks on putting together
a proposal. And a couple days before the meeting. John
asked for all the information that I had put together and
completely redid the whole proposal that I had done, line
item by line item, and came up with his own idea that he
wanted to sell to the customer.
So, we proceeded to-- The day of the meeting
came. We proceeded to go down to the meeting. And I think
we were at the Key Bridge Marriott. And Mr. Bjorn, I think
we were in our separate cars, and Mr. Bjorn pulled over and
told Todd Heidelberger, who had also accompanied us, that
Todd was going to have to go at this solo.
And Todd was not familiar with the proposal. I was
not that familiar with the proposal.

So, in my estimation Mr. Bjorn, for whatever reason, decided on the way to the appointment that he was not going to attend that appointment--

MR. SILVESTRI: Objection, that is opinion testimony. Pure speculation, Your Honor.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Did Mr. Bjorn appear at the appointment?

A He did not.

Q Did he ever provide you with any explanation as to why he didn't?

A He did not.

Q Were you successful in landing the account?

A We were not.

Q Were you successful as a seller of maintenance services?

THE COURT: Does this really bear on the issue that I have to decide today?

MR. POCHUCHA: Well, it is just the pattern

of good
17 treatment and then bad treatment. That's all, Your Honor.
18 THE COURT: But that is not really the issue, is
19 it?
20 MR. POCHUCHA: Well, it is circumstantial evidence
21 of the treatment that was visited upon Ms. Burns. That Mr.
22 Bjorn pursues a course of conduct with women, that he wants
23 to have a relationship with them. That when they don't have
24 that relationship with him, then he changes that conduct.
25 And it is because they are a woman that he does that. It is

1 because of their sex that he does that.
2 And this is just the end of the first episode of
3 that pattern.
4 THE COURT: I can't see what relevance-- Whether

or not a presentation should have been made the way a salesperson wanted to make it or the president of the company wanted to make it doesn't show an abusive pattern of treatment.

MR. POCHUCHA: I understand.

THE COURT: I don't know whether Mr. Bjorn is a good businessman or whether he is a poor one. I don't know.

But what decisions he made about a sales presentation would have nothing to do with the issues I have got to decide here.

MR. POCHUCHA: I understand, Your Honor. The point that we are trying to make was that he didn't show up at all, didn't provide assistance. That was more than-- But that's--

THE COURT: That's his sole judgment, whether he provides assistance or not, isn't it? I mean, it doesn't make any difference to the case whether he does or whether he

22 doesn't.
23 MR. POCHUCHA: Well, we would contend that it does
24 to the extent that he provides assistance when he wants
25 someone to have a romantic relationship with him and then--

1 You know, for reasons completely outside of business
2 reasons. And then when he decides that that person is no
3 longer going to, that is not going to happen, then he
4 withdraws that assistance.
5 That's part of our position, Your Honor. We
6 believe that that is what occurred with Ms. Burns--
7 THE COURT: That's how he ran his company and how
8 he determined how he was going to do his sales program, as to
9 whether or not he was going to help somebody that was
10 romantically involved with him?

11 MR. POCHUCHA: As remarkable as it

seems, that is
12 what happened, Judge. And that's what we intend to show
13 through Ms. Burns and Ms. Schaeffer and, Ms. Kearns.
14 Ms. Burns when she was terminated was the top
15 salesperson at the Herndon office. I mean, it wasn't a
16 business decision.
17 THE COURT: All right.
18 MR. POCHUCHA: But I understand, Judge. I will try
19 to move through it as quickly as I can.
20 BY MR. POCHUCHA: (Continuing)
21 Q Tell us about the termination of your employment,
22 how you came to leave, just briefly, if you could.
23 MR. SILVESTRI: Objection, relevance again, Your
24 Honor. We are not talking about termination of employment
25 here except in connection with retaliation for filing an EEOC

charge--

THE COURT: What relevance would her termination have?

MR. POCHUCHA: It is the conclusion of the pattern, Judge. That's all.

THE COURT: Well, she hasn't testified to any sexual harassment at all.

MR. POCHUCHA: Well, she--

THE COURT: So, how are you-- You are now going to have her say that her employment was terminated because of some kind of sexual harassment?

MR. POCHUCHA: Judge, the plaintiff's position in this case is that Mr. Bjorn had flirtatious behavior toward an individual to induce them to have a relationship with him. That he participated in that activity.

And that when there was a rejection, that his treatment of the person within the workplace changed

18 drastically. And that that constitutes sexual discrimination
19 within the meaning of Title VII.
20 THE COURT: Well, there is nothing that this
21 witness has testified to that constituted any improper
22 conduct on the part of anybody.
23 So, what difference does it make how she was
24 terminated unless there was some admission made?
25 MR. POCHUCHA: All right, sir. I understand, Your

1 Honor. May I consult with--
2 BY MR. POCHUCHA: (Continuing)
3 Q Ms. Kearns, did Mr. Bjorn provide assistance to you
4 in becoming successful as a seller of maintenance services?
5 A No, he did not.
6 Q Did he provide assistance to you in doing your
7 receptionist duties?
8 A Yes.

Q And what changed between the receptionist duties and the sales duties?

A I think for one, Pat was hired, and I think that the focus shifted to Pat. And then after awhile I saw the same pattern with Sue, Sue Foreman. And I saw that Mr. Bjorn made allowances for the people that he liked at the time.

For example, Sue Foreman, we had a policy in sales that every account had to be in the ACT database. And if your name was on that account, that account was yours. And I actually saw that Mr. Bjorn violated his own policy when Sue Foreman--

MR. SILVESTRI: Objection, opinion, Your Honor.

THE COURT: Objection overruled.

A When Sue Foreman set up an appointment to go to National Rifle Association, which was clearly labeled as

24 Pat's account.

25 MR. POCHUCHA: Thank you, Your Honor. I don't have

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1 any further questions.
2 THE COURT: All right. Do you have any questions?
3 MR. SILVESTRI: Just very short.
4
5 CROSS-EXAMINATION
6 BY MR. SILVESTRI:
7 Q Good morning, Ms. Kearns?
8 A Good morning.
9 Q Isn't it true that Mr. Bjorn assisted you in
10 preparing offers?
11 A Yes, normally.
12 Q And isn't it true that you didn't ask for his help
13 on sales calls?
14 A That's probably correct.
15 Q Miss Gavitt was your supervisor, wasn't she?
16 A Yes.
17 Q And she was very helpful in providing training and

assistance, wasn't she?
A Yes.

Q And she reported directly to John Bjorn, didn't she?
A Yes.
Q And isn't it true that you have no memory of Mr. Bjorn yelling at any other salesperson, man or woman, except for Ms. Burns, correct?

A That's correct.
Q And isn't it true that you could not tell what Mr. Bjorn was yelling Ms. Burns about, correct?
A Correct.
Q And isn't true that any discussions that involved counseling or criticism that you heard Mr. Bjorn say, all involved work issues, correct? That is, like you are not doing your job, or do this better, something like

that?

A Towards me, yes.

Q And towards Ms. Burns, correct?

A I don't recall the details of the conversation.

Q You don't recall any details of any conversation with Ms. Burns?

MR. POCHUCHA: Your Honor, I believe that counsel is cutting off the witness' answer. I object.

THE COURT: Well, the witness may answer, complete her answer.

BY MR. SILVESTRI: (Continuing)

Q Would you finish that answer?

A No. I don't recall any specifics of conversations.

MR. SILVESTRI: Okay. Let me consult one minute, Your Honor.

No further questions.

THE COURT: Do you have anything further?

MR. POCHUCHA: No, sir, I don't, Your Honor.

THE COURT: Thank you. You may step down. You may be excused.

NOTE: The witness stood down.

THE COURT: Who is your next witness?

MR. POCHUCHA: Sue Foreman Temple, Your Honor.

NOTE: The witness is sworn.

SUE F. TEMPLE, called by counsel for the plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Ms. Temple, would you identify yourself for the Court, please.

A I am Sue Foreman Temple.

Q And your educational background, just briefly, ma'am.

A I graduated from Central Michigan University in 1986.

Q Your present place of employment?
A Platinum Technology.
Q Were you formerly employed at UniNet?
A Correct.
Q Describe for the Court, if you would, your hiring at UniNet.
A My hiring to UniNet?

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I was hired in 1992 by John Bjorn at the time.
Q And what was the position for which you were hired?
A A sales rep.
Q And during your period of employment, did you receive any training as a sales rep?
A I would consider it on-the-job training at UniNet.
Q And who provided that on-the-job training, if anyone?
A Management.
Q And who was your manager?
A John Bjorn.
Q Who was the president of the company while you were

there?
A John Bjorn.
Q Were you aware of-- Strike that.
Did you have occasion to attend social functions after work with employees at UniNet?
A Yes.
Q Did you have occasion to attend those functions with Mr. Bjorn?
A Yes.
Q Did anything unusual happen at any of those functions regarding Mr. Bjorn?
A Could you ask that in another way?
Q All right. Did you have an experience that you

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considered to be disturbing with Mr. Bjorn that related to attendance at a Happy Hour?
MR. SILVESTRI: Objection, leading.
THE COURT: Objection overruled.
BY MR. POCHUCHA: (Continuing)
Q You can answer.

A After one Happy Hour there was an incident leaving the restaurant where he, he did approach me.

Q You need to describe for the Court what occurred. I am sorry.

A Several people from UniNet had been at a Happy Hour. It was getting late. Everyone was leaving and went our separate ways to our cars in various parking lots.

I was going to my car, unlocking the door, and John Bjorn pulled up in his car beside me, asking, called me over to his car, asking if I was fine. And the next thing I know after some discussion was he leaned over and kissed me.

Q And what was your reaction to that?

A Surprised.

Q Did you have occasion to discuss that with him later?

A The next day in the office he called me into his office, and he asked how I felt about what had

happened the
24 night before. And we-- I told him that I was surprised that
25 it had happened and that it was somewhat upsetting. And we

1 decided to just forget about it as if it did not happen.
2 Q At that time period, how would you describe the
3 sales assistance that was provided to you by John Bjorn as
4 compared to the sales assistance that he provided to other
5 sales individuals within the office?
6 MR. SILVESTRI: Objection, lack of foundation with
7 respect to other salespeople, Your Honor.
8 THE COURT: Well, if she knows.
9 BY MR. POCHUCHA: (Continuing)
10 Q Do you understand?
11 A I, to be honest, felt that I was given some special
12 attention.
13 Q What do you understand flirting to be?

A That would be very broad.

MR. SILVESTRI: Objection, Your Honor, relevance of the question.

We are talking about the witness' conclusion of what flirting is.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Did John Bjorn flirt with you in the office other than this kiss?

MR. SILVESTRI: Objection, the same, relevance.

THE COURT: Well, I will sustain the objection as to the characterization.

She can testify to the conduct. I don't know whether it is flirting or whether it is not, but we will figure out what the conduct is when the evidence is over.

MR. POCHUCHA: All right, sir.

BY MR. POCHUCHA: (Continuing)

Q Was there other conduct-- Was there any

conduct in
7 the office that was similar to the kiss or that caused you to
8 believe that Mr. Bjorn wanted to have a romantic relationship
9 with you?
10 A Yes.
11 Q Describe that for the Court, please.
12 A The atmosphere within the workplace was-- I felt
13 there was a lot-- It was very flirtatious toward me, just
14 kind of a continuing atmosphere of that.
15 Q All right, ma'am. And what, if anything, did you
16 do in response to that?
17 A Nothing, nothing in direct response to that.
18 Q How did that make you-- What kind of impression
19 did that have on you or effect-- Strike that.
20 Did that have any effect upon your ability to
21 perform your duties at work?
22 A No.
23 Q And when you say it was flirtatious, was there ever
24 any flirtatious conduct towards men that you observed?

25 A Toward men? No.

1 MR. SILVESTRI: Objection, Your Honor. I object to
2 the form of the question. Flirtatious conduct by whom toward
3 men? By Mr. Bjorn?
4 MR. POCHUCHA: It was really anyone.
5 THE COURT: Well, you can cross-examine.

6 MR. SILVESTRI: Sure.
7 BY MR. POCHUCHA: (Continuing)
8 Q Were there interactions that you had with Mr. Bjorn
9 other than what you have described that you considered to be
10 inappropriate?
11 A There was one other occasion while I was working at
12 UniNet that I felt was unprofessional, and I felt intimidated
13 by the proposition.
14 We were on sales calls together in D.C. one day,
15 spending the day together. And in the afternoon,

after
16 lunch, driving to our afternoon appointment, he did bring up
17 the prospect of-- Well, basically his words were, I do not
18 fool around on my wife, but if you would be interested, I
19 would be.
20 Q What was your response?
21 A I don't-- I don't know if I said anything to be
22 honest with you, what my exact words were at that point. I
23 didn't know how to respond to it.
24 Q Did the assistance that you have described from Mr.
25 Bjorn continue throughout your term of employment at UniNet?

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1 A No. Toward the end of my employment at UniNet it
2 did not continue.
3 Q And how, if at all, did that affect your ability to

generate income?

A I don't feel that John Bjorn's flirting with me or not flirting with me influenced my ability or my income. There were a lot of factors.

Q All right. Would you describe how the policies and procedures in general were enforced at UniNet?

When I say in general enforced at UniNet, were the policies and procedures strict and set in stone and everybody knew about them, or was it a place where policies and procedures were changing and varying on a day-to-day basis?

MR. SILVESTRI: Objection to the form of the question, relevance, and it is a compound question.

THE COURT: Well, I think you are going to have to lay some kind of a foundation concerning what policies and procedures she knows about and what you are talking about if it is an important question to you.

The objection is well taken, but--

MR. POCHUCHA: I understand, Your Honor.

BY MR. POCHUCHA: (Continuing)

Q Were there policies-- Do you recall any general policies that were in effect when you were at UniNet?

A Yeah, there were several general policies. The

feeling-- There were general policies.

Q All right. Can you recall any of them?

A No, not--

Q The general policies, were they enforced or were they not enforced?

MR. SILVESTRI: Objection. How can she tell whether--

THE COURT: Objection sustained. I don't see any relevancy one way or another, whether they are or whether

they are not.

MR. POCHUCHA: One of the allegations-- I am sorry. Excuse me, Judge.

One of the allegations that the defense will make about Ms. Burns is that she did not follow policies and procedures through the course of her employment.

I didn't want to have to have Ms. Temple here all day or come back for that.

THE COURT: Well, sometimes that's the only way you can do it without trying-- I mean, you are asking an impossible question for any witness to go over a book of regulations and talk in general-- That's an impossible situation. It doesn't deal with the issue here.

Now, if there is something you want to rebut later, why, you can certainly do it. But this is not the way to go about it.

MR. POCHUCHA: Yes, sir.
BY MR. POCHUCHA: (Continuing)
Q Would you describe the amount of time that Mr. Bjorn spent at your desk versus the desks of others?
MR. SILVESTRI: Objection to the form of the question, Your Honor. Calls for comparison. No foundation.
THE COURT: Objection overruled.
A I would answer that with excessive. I would say he spent more time-- It was a small office, you have to understand, but he spend quite, a great deal of time with me.
Q All right, ma'am. Did you have occasion to observe interactions between Ms. Burns and Mr. Bjorn?
A Very little. Pat was employed with UniNet when I started with the company for a short period of time and then she left.
Q Did you disclose to anyone the kiss or the other proposition that Mr. Bjorn made to you?
A Not for, not for quite some time. I finally

did

19 confide in my new manager that was put in place--
20 Q Who was that?
21 A --several months later. John Lyons.
22 Q And did anything happen as a result of your having
23 confided that to him?
24 A Nothing immediately. Nothing abruptly.
25 But it was shortly after that that I was fired from

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1 UniNet.
2 Q And who fired you?
3 A Both John Lyons and John Bjorn.
4 Q And what part, if any, did the disclosure of that
5 proposition have in your firing?
6 MR. SILVESTRI: Objection, lack of foundation, Your
7 Honor. Calls for opinion.
8 THE COURT: Objection sustained.
9 BY MR. POCHUCHA: (Continuing)
10 Q What were the reasons given to you for your
11 termination?
12 A Lack of following procedure.

Q And what were the procedures that you were alleged to not have followed?

A Whatever procedures were implemented.

Q Did you fail to follow the procedures as it was alleged?

A I don't believe so, no. A great deal of what I was told as being the reason for my termination was my attitude as well.

Q What about your attitude?

A I am sorry?

Q What was it about your attitude that caused your employment to be terminated from what you were told?

A Lack of following guidelines, I guess. In John

Lyons' words, he thought I was a troublemaker.

Q Were you ever told anything specifically you did to cause trouble?

A Not that I recall, no.

Q Were you a troublemaker?
A I don't believe so.
Q Did you fail to follow procedures?
A No.
Q Would you have known what the procedure was?
A Yes and no.
Some procedures at UniNet it was kind of shooting from the hip, but they did start-- When they wanted to document something, then a procedure would be put in place.
MR. POCHUCHA: If I may have a moment, Your Honor.
THE COURT: All right.
MR. POCHUCHA: Thank you, Your Honor. That's all the questions I have.
THE COURT: Cross-examine.

CROSS-EXAMINATION
BY MR. SILVESTRI:
Q Let's get specific, Miss Temple. My name is Steve Silvestri. I think we met once before.
You were fired on the day or the day after

you
25 walked out on the sales floor and called your boss, John

1 Lyons, an asshole, weren't you?
2 A Yes.
3 Q And you called him an asshole to the person, the
4 sales rep, that you knew that John Lyons was dating, correct?
5 A Correct.
6 Q And you did it to insult him, correct?
7 A I would like to correct your assumption that this
8 was in the middle of the sales floor.
9 Q It was at her desk, wasn't it?
10 A Yes.
11 Q And you didn't whisper it to her, did you?
12 A No, but it was in conversational--
13 Q You used the conversational voice that you used--
14 MR. POCHUCHA: Your Honor, counsel is interrupting
15 the witness' answer again.
16 THE COURT: Well, I didn't hear him do

that, but
she may finish her answer.
BY MR. SILVESTRI: (Continuing)
Q Did you finish your answer?
A I said it was in conversational tone.
Q Right. Thank you. And I say the same conversational tone that you are talking about here, right?
Is that correct?
A Talking about--
Q What is your voice right now.

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A Yes.
Q And isn't it also true that you have no knowledge
as to the time you informed Mr. Lyons about this kiss with
reference to your termination, is that correct?
A I wouldn't say no reference. It was a few months
prior to that.
Q A few months prior to it?
A Yeah, I would say probably. I am not even going to
guess.

Q More than three months?
A Could be.
Q And you don't even know whether he was your supervisor at that time, correct?
A No, that's not correct.
Q Well, didn't you testify at page 109 of your deposition that I took from you--
I will withdraw the question, Your Honor.
THE COURT: All right.
MR. SILVESTRI: It's not the right place.
THE COURT: Go ahead.
BY MR. SILVESTRI: (Continuing)
Q It is also true that you didn't ask Mr. Lyons when you told him, regardless of whether he was your supervisor or not, to take specific action, correct?
A He was my supervisor at the time, I believe.

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Q All right. Let's take that as an assumption.
A Okay.
Q Let's take that as a fact. Okay.
A I did not ask him to take any, to do anything

about
it, no.
Q Now, prior to the time that Mr. Lyons became your
supervisor, isn't it a fact that you went out at Happy Hour
with him and other employees?
A Sure.
Q And isn't it a fact that you stayed over at his
house after Happy Hours were over?
A On occasion.
Q And you had no relationship with Mr. Lyons at that
point in time other than you worked together, correct?
A And I considered us friends.
Q Okay. And you described in your direct testimony
that there was a climate of relationships, and I am using my
word, is that correct, at UniNet?
A Yes.
Q Who are you married to now?
A John Temple.
Q Wasn't John Temple a customer of UniNet or a
vendor?
A No.

25 Q Did he have a business relationship at any point in

S. F. Temple - Cross

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1 time with UniNet?
2 A I don't believe so.
3 Q Okay. And didn't you have occasion to go out to
4 dinner on at least one occasion with another employee at
5 UniNet?
6 A Let me go back and correct the other question.
7 He was working for a rental computer company at the
8 time. I don't recall any specifics, if there was ever any
9 business conducted between those two companies.
10 Q Well, you met him when he called on UniNet, didn't
11 you?
12 A Who?
13 Q Mr. Temple.
14 A No.
15 Q All right. Now, the incident in the parking lot

that you described in your direct examination, Ms. Temple,
that kiss occurred after you and Mr. Bjorn and the others had
been drinking?
A Correct.
Q And had quite a bit to drink?
A Correct.
Q In fact, I think you characterized it in your deposition as being legally intoxicated, correct?
A I don't know if I said that or not.
Q Well, regardless of whether you said it, it is

true, isn't it?
A I won't comment on that.
Q Well--
A I don't know.
Q --you had been drinking beers?
A Or margaritas or--
Q And shooters? Didn't you indicate that you had been drinking shooters?
A I do not recall exactly what we were drinking that evening.

Q And isn't it a fact that you leaned into Mr. Bjorn's car when the kiss occurred?
A Yes.
Q And isn't it also a fact that after this kiss occurred, you went around to the passenger side and got in the car with him?
A Yes.
Q And isn't it also a fact that the next day Mr. Bjorn apologized to you for this incident?
A Yes.
Q And isn't it also a fact that he said it wouldn't happen again?
A Yes.
Q And it never happened again, did it?
A That's correct.

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Q And you never attempted to kiss him again either, did you?
A No.
Q Isn't it also a fact that you never at any point in time made Mr. Bjorn aware by telling him that you objected to

any conduct he had towards you?

A I would not say that's-- I wouldn't agree with that. I believe by our discussion after that incident, it was-- I made myself clear.

Q That's when you apologized to each other?

A When he apologized to me.

Q And you didn't apologize to him?

A I told him that-- I don't remember what words were actually said. So, I shouldn't say that. We agreed to forget about it.

Q You agreed to forget about it? And you agreed with him that you would forget about it?

A Correct.

Q All right. And isn't it also a fact that after your termination of your employment-- You resigned from employment, didn't you?

A That offer was made to me after they fired me, and I took it.

Q You took it? You submitted a letter of resignation in lieu of being fired, correct?

A Correct.
Q And after that, didn't you send Mr. Bjorn a card thanking him for his support of you during the time when you were at UniNet?
A I would have to see that card to recall that.
Q Did you say in your letter of resignation that you appreciated the support and the opportunity to work with Mr. Bjorn?
A Yes.
Q And that you thanked him for the learning experience that UniNet provided?
A Yeah. It was kind of a canned, nice resignation letter.
Q Didn't you testify at your deposition, question-- On page 169, Mr. Pochucha.
Now, in addition to this letter that goes to the corporation, you also gave Mr. Bjorn a card, did you not, after you left UniNet? Answer: A card? Yes.
Answer: What type of card? Question:

Thanking
him for all his support. Hmmm, is this card in existence? I
don't recall doing that, but if I sent a thank you--
Question: You did give him a card of some kind,
didn't you, or don't you-- I don't remember.
A Okay, so, what does--
Q Your testimony today is you--

S. F. Temple - Cross

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MR. POCHUCHA: Your Honor, I object to the line of
questioning because it is consistent with what her testimony
was.
THE COURT: Objection overruled.
MR. POCHUCHA: It is improper impeachment.
THE COURT: Objection overruled.
BY MR. SILVESTRI: (Continuing)
Q Your testimony today, ma'am, is that you don't
remember giving him a card, a thank-you card?
A I believe that's what I said, what you just read.

MR. SILVESTRI: Thank you.
THE COURT: All right, do you have any more?
MR. SILVESTRI: That's it, Your Honor.
MR. POCHUCHA: Briefly, Your Honor.
THE COURT: All right.

REDIRECT EXAMINATION
BY MR. POCHUCHA:
Q Would you tell the Court what your relationship was with Joanne when you made that statement to her?
A I thought of Joanne as much as a friend as a coworker at that time.
Q And what was her relationship with John Lyons at the time?
A They were dating.

Q Were others dating within the office, to your knowledge, at that time?
A At that time Laura had started at UniNet, and it was-- I don't know if it was-- It was widely rumored that

her and John Bjorn were also dating.

Q Did you have occasion to observe them together at the office at all?

A Yeah, of course, at the office.

Q Anything unusual about your observations of Mr. Bjorn and Laura together?

MR. SILVESTRI: Objection, leading, Your Honor.

THE COURT: Objection overruled.

A A great deal of time. They spent a good deal of time together at the office.

Q All right, ma'am.

What was the normal-- Tell the Court what the normal procedure for termination was. Were there steps, or was it out of the blue, or do you recall?

MR. SILVESTRI: Objection to relevance, Your Honor. And a compound question.

THE COURT: What's the relevance in going through the steps?

MR. POCHUCHA: I expect her-- I don't want to-- I

24 expect the testimony to enlighten the Court about the manner
25 in which the usual--

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1 THE COURT: Would it make any difference about the
2 manner, is what I am asking.
3 Does that make any difference to this case the
4 manner in which she was terminated?
5 MR. POCHUCHA: Well, it is the same, same idea,
6 that-- Obviously, with this witness' testimony it is clear
7 that--
8 THE COURT: Well, assuming your theory that you are
9 going through, does it matter that she was terminated
10 according to the procedures or not in accordance with the
11 procedures?
12 Would it make any difference?
13 MR. POCHUCHA: I was of the opinion-- Counsel was

of the opinion that it would make a difference if it was wrongfully done to show that it was more of a retaliation to have her removed rather than following the normal procedures.

But if it doesn't make a difference to the Court, that's--

THE COURT: Well, if it was wrongly done, what would you mean by wrongfully done?

MR. POCHUCHA: Well, if they had a procedure that you would be on probation or you wouldn't be terminated on the spot except for great malfeasance--

THE COURT: Well, if you can establish that that

procedure exists, go ahead, ask your questions.

BY MR. POCHUCHA: (Continuing)

Q All right. Was there a procedure for termination

when you were at UniNet, ma'am?

A I can only speak for the way that mine was handled. I don't recall that many people being terminated.

MR. POCHUCHA: Thank you. I will withdraw the question.

THE COURT: All right. Thank you, you may step down. You may be excused.

NOTE: The witness stood down.

THE COURT: And we will take just a brief recess.

NOTE: At this point a recess is taken; at the conclusion of which the case continues as follows:

MR. POCHUCHA: Holly McCaffery, Your Honor.

NOTE: The witness is sworn.

HOLLY C. MCCAFFERY, called by counsel for the plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Ms. McCaffery, would you state your full name for the Court, please.

A Holly Christine McCaffery.

25 Q Where are you presently employed?

1 A Weichert Realtors in Front Royal.
2 Q All right, ma'am. Did you have occasion to be
3 employed at UniNet?
4 A Yes.
5 Q And during what period of time was that?
6 A January of '92 through May of '93, approximately.
7 Q And describe for the Court, if you would, what your
8 duties there were.
9 A First, it was, I was receptionist and taking care
10 of accounts. And then I just took care of accounts.
11 Q Did you have occasion to observe interactions
12 between Patricia Burns and John Bjorn?
13 A Yeah.
14 Q Describe your observations for the Court, if you
15 will.
16 A Well, John would have outbursts and

directed them
17 at Pat in front of everybody. And so-- It happened often.
18 Q Did you observe Pat simultaneously with that
19 occurrence?
20 A Yes. Pat and I would go to lunch, and she would be
21 upset, and we would talk.
22 Q Are you familiar with the relationship between
23 Southeastern Computer Consultants, Inc. and UniNet?
24 MR. SILVESTRI: Objection to the form of the
25 question. What's the relationship, Your Honor?

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1 MR. POCHUCHA: I asked her-- My question was, are
2 you familiar with the relationship between Southeastern
3 Computer Consultants, Inc. and UniNet?
4 THE COURT: Objection overruled.
5 A SCCI was the mother company.
6 Q Was what? I'm sorry?

A Was the mother company, was the--
Q When you say SCCI, who are you referring to?
A South--
Q Southeastern Computer Consultants?
A It has been a while.
Q Did you observe Patricia Burns in her interactions with others within the office at UniNet other than Mr. Bjorn?
A Oh, yeah.
Q How would you describe those interactions?
A She was always very pleasant.
Q Do you recall any statements by Mr. Bjorn pertaining to his marital relationship while you were at UniNet?
A Just that it was, like through the office, he was having a hard time with his wife or--
MR. SILVESTRI: Move to strike the answer as not responsive, Your Honor.
The question was, do you recall any statements by Mr. Bjorn about his marital relations.

THE COURT: Objection sustained.

MR. POCHUCHA: If I may have a moment, Your Honor.

BY MR. POCHUCHA: (Continuing)

Q Can you provide the Court with the number of occasions you observed the interactions that you have previously described take place between Mr. Bjorn and Ms. Burns?

A Not numbers, no.

Q Can you describe the severity or lack of severity of those interactions as you mentioned them?

MR. SILVESTRI: Objection, Your Honor, calls for opinion.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q You can answer it.

A When it-- When it was bad, it was bad. You know, he would have a fit.

Q Did you ever observe Ms. Burns in tears?

A Yes.

Q And when was that? Describe that incident briefly for the Court.

A Well, one comes to mind. It was one of the last days of Pat, before she left UniNet, and he was screaming about something, about an account. And it just all blew up, and she ran out the back crying.

H. C. McCaffery - Direct

Q The observations that you have described of Mr. Bjorn and Ms. Burns, did you have those same observations of Mr. Bjorn's interactions with other people or not?

A Well, with myself.

MR. POCHUCHA: All right, ma'am. That's all the questions I have.

THE COURT: All right. Cross-examine.

CROSS-EXAMINATION

BY MR. SILVESTRI:

Q Ms. McCaffery, my name is Steve Silvestri. I don't think we have met yet.

Your involvement in this case started with a dinner or drinks at a restaurant at a reunion of UniNet employees, is that correct?

A No.

Q Did you have occasion to prepare an affidavit to assist Ms. Burns in her case?

A I did.

Q And that affidavit was drafted up for you by Ms. Burns and faxed to your home or your business, correct?

A Yes.

Q And you signed that affidavit?

A Yes.

MR. SILVESTRI: Can I have the clerk mark this-- I

think our last number is 98. We submitted exhibit binders,

Your Honor. 97. So, that would be 98.

MR. POCHUCHA: No objection, Your Honor.

BY MR. SILVESTRI: (Continuing)

Q Can I have you take a look at Exhibit 98, ma'am.

Don't you state in the bottom of that affidavit that you have witnessed Mr. Bjorn's temper occasionally with all employees? Don't you state that?

A Well, yeah, I told you, he would have a fit.

Q With all employees?

A At certain times.

MR. SILVESTRI: No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. POCHUCHA:

Q Ms. McCaffery, would you read the paragraph that Mr. Silvestri was just referring to in its entirety.

A Although I have--

MR. SILVESTRI: Objection, Your Honor. How is this coming in on direct examination? How is this out-of-court statement, this affidavit, being read into the record by Mr.

Pochucha?

It is not testimony. It is an affidavit that can be used for cross-examination purposes. The witness is here. Why should she be reading her affidavit into the

record?

THE COURT: I think that is well taken. It speaks for itself. Objection sustained.

MR. POCHUCHA: Well, Judge, may I address it?

THE COURT: It speaks for itself. I mean, it is marked, and I can see it.

MR. POCHUCHA: All right, Your Honor. It was-- It was just taken out of context, Judge. That's all I wanted to--

THE COURT: Well, you can ask her whatever question you want to.

BY MR. POCHUCHA: (Continuing)

Q All right. The statement that you just read-- Look over your affidavit just a second.

Don't read it out loud, but read to yourself the last paragraph of the affidavit.

MR. SILVESTRI: Your Honor, that's the same as having her read it into the record.

THE COURT: No, no. Objection overruled.

Now, do you have a question?

BY MR. POCHUCHA: (Continuing)

Q Yes. The temper that Mr. Bjorn displayed with Ms. Burns, was that the same sort of reaction you saw with other people that Mr. Silvestri asked you about?

A At times, no, no.

Q And what was different about it?

A Well, it was mean when it was directed at Pat.

MR. SILVESTRI: Objection to the answer, Your Honor. It is conclusory.

THE COURT: Objection overruled.

MR. POCHUCHA: That's all, Your Honor.

Thank you.

MR. SILVESTRI: Recross?

THE COURT: All right, one question.

RECROSS-EXAMINATION

BY MR. SILVESTRI:

Q Isn't it a fact, Ms. McCaffery, that you observed Mr. Bjorn be mean to a number of employees, including men and women?

A Sure.

MR. SILVESTRI: No further questions, Your Honor.

THE COURT: All right. Thank you, you may step down. You may be excused.

THE WITNESS: Thank you very much.

NOTE: The witness stood down.

THE COURT: All right. Who is the next witness?

MR. POCHUCHA: Diana Wilson, Your Honor.

NOTE: The witness is sworn.

DIANA WILSON, a witness called by counsel for the

plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Ms. Wilson, would you identify yourself for the Court, please.

A My name is Diana Wilson.

Q Where are you employed, ma'am?

A I work for Hammond, Glandon and Associates. It is a contractor.

Q Were you formerly employed at UniNet?

A Yes, I was.

Q What was the period of time that you were employed there?

A Approximately January '94 till February or March of '95.

Q Describe for the Court, if you would, what your duties were at UniNet?

A I was the administrative assistant. I would also assist in putting together various pieces of

paperwork that
20 would come through my desk, purchase orders with their
21 packing slips, things of that nature.
22 But my main responsibility-- Some filing. My main
23 responsibility was answering the telephones.
24 Q All right, ma'am.
25 Did you have occasion to receive calls from Ms.

1 Burns?
2 A Yes, I did.
3 Q And did you have occasion to receive instructions
4 from Mr. Bjorn regarding the manner in which you operated as
5 a receptionist?
6 A I am sorry?
7 Q Were you-- Strike that.
8 Who was your supervisor?
9 A At the time I was employed, Donna Gavitt was my
10 supervisor. I was then transferred over, and Nancy was my

supervisor at that time.
Q And who was the president of the company when you were there?
A Mr. Bjorn was the president of the company.
Q And did Mr. Bjorn ever have occasion to give you any instructions?
A Certainly.
Q All right. Did Mr. Bjorn ever give you any instructions pertaining to Ms. Burns?
A Yes.
Q All right. Tell the Court what instructions you were given by Mr. Bjorn pertaining to Ms. Burns.
A On one particular day I was instructed not to patch any calls through to Purchasing.
Q And around what time was this in terms of years?

A I don't recall. I don't recall specific, specifically what time frame this was in.
I would say early '95, but I can't recall to be sure.

Q All right, ma'am. And are you familiar with the manner in which orders were prioritized for the shipment and delivery of equipment at UniNet?

A To a certain degree, yes.

Q All right. Do you have any knowledge of whether or not Mr. Bjorn ever delayed the orders of Ms. Burns' equipment for her customers?

A Well, I am, I am familiar with the time that there was an account, Loudoun Hospital, that was delinquent in payment. And they were awaiting a shipment. And that shipment was placed, was delayed.

Q All right, ma'am. Was there a policy that you were aware of at UniNet pertaining to the shipment of orders to companies in relation to their payment status?

A Not that I am aware of, no.

Q And who was the person who was responsible during your term of employment for communicating orders with the

vendors?

A Karen Biesemeyer was the purchasing agent, but I don't believe she had the final say.

MR. SILVESTRI: Objection, conclusion, speculation,

Your Honor.

As to the last comment, move to strike it.

THE COURT: Objection sustained, unless she knows.

BY MR. POCHUCHA: (Continuing)

Q Do you know what Ms. Biesemeyer's duties were as purchasing agent?

A Specifically I do not.

Q Did you work with her at all?

A On occasion I would assist her in putting together some various paperwork and making some copies of certain things. But other than that, no.

Q Were you aware of any policy with regard to salespersons' contacts with Ms. Biesemeyer pertaining to the

status of their orders?

A I am sorry. I need you to repeat that, please.

Q Were you aware of any policy pertaining to the ability of salespersons to contact Ms. Biesemeyer regarding the status of their orders?

A No policy, no.

Q Did you have occasion to connect calls from salespeople to Ms. Biesemeyer for them to check on their orders?

A Absolutely.

Q Was that a regular occurrence, or was that an infrequent occurrence?

A Regular.

Q At the time that Mr. Bjorn advised you not to put through Ms. Burns' calls to Ms. Biesemeyer, was there any restriction upon the time limit within which that was to last?

In other words, were you just supposed to do

it for
one-- Far enough for you to object.
MR. SILVESTRI: I object to the question as being
compound and calling for speculation.
If the question is what did Mr. Bjorn tell her--
MR. POCHUCHA: I'll rephrase it.
BY MR. POCHUCHA: (Continuing)
Q Did Mr. Bjorn give you a specific time that you
were to restrict Ms. Burns' calls to Ms. Biesemeyer?
MR. SILVESTRI: I object to that question as
leading, Your Honor.
THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q Were you at any time given a direction by Mr. Bjorn
regarding the length with which you were to restrict calls
from Ms. Burns to Ms. Biesemeyer?
MR. SILVESTRI: Also the same objection, Your
Honor.
THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)

Q Tell the Court what Mr. Bjorn told you about calls from Ms. Burns to Ms. Biesemeyer.

A On one incident I was told not to patch calls through to Purchasing.

Q And were you ever told anything else?

MR. SILVESTRI: Objection, leading, Your Honor.

THE COURT: Objection overruled.

A In relation to--

Q The same subject that Mr. Bjorn had.

A Just that I was not to patch any calls from Ms. Burns back to the purchasing agent.

Q Thank you.

Were you aware of whether or not there was interoffice dating at UniNet?

MR. SILVESTRI: Objection, relevance, Your Honor.

There is no dating that is alleged in the complaint. Ms. Burns does not allege that she was dating Mr. Bjorn or anybody else at UniNet.

How is that relevant?

MR. POCHUCHA: It is a question of the atmosphere

there that was conducive to the conduct which we have alleged
on the part of Mr. Bjorn.
THE COURT: Is office dating an impermissible
activity?
MR. POCHUCHA: It was not prohibited-- Is it-- It

D. Wilson - Direct

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is not under the law, I don't believe, but--
THE COURT: Then what relevance would it have?
What would make a difference?
MR. POCHUCHA: It would make a difference because
if there was-- Some offices have policies not to do that, I
believe, not to have interoffice dating. And if it were to
be encouraged, if it were to be pressured, then it would be
our position in the case--
MR. SILVESTRI: Your Honor--
MR. POCHUCHA: --it would increase Mr. Bjorn's odds

of accomplishing what we are claiming he set out to do.

THE COURT: Objection sustained.

MR. SILVESTRI: Thank you. I am sorry for interrupting, Your Honor. But one of the problems I have is that while Mr. Pochucha is entitled to respond to my objections, he is speaking facts in front of the witness, and that's a problem.

THE COURT: I don't think that is a big problem for you.

Go ahead and ask your next question.

BY MR. POCHUCHA: (Continuing)

Q Are you familiar with the relationship between Southeastern Computer Consultants, Inc. and UniNet?

A Yes, I am.

Q Describe that for the Court, if you would, please.

A I at the time thought that they were a sister

company. Come to find out it was actually a parent company of UniNet.

MR. SILVESTRI: Move to strike the answer as conclusory and speculation.

THE COURT: Well, objection overruled. I am not sure what it proves, but objection overruled.

BY MR. POCHUCHA: (Continuing)

Q Are you familiar with the Loudoun Hospital account?

A Vaguely, yes, I am.

Q Do you know the individual salesperson who generated that account?

A I believe Ms. Burns worked on that account.

MR. SILVESTRI: The same objection, Your Honor, speculation.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q Tell the Court about the circumstances of the Federal Express billing to Ms. Burns' account if you are familiar with that in relation to Loudoun Hospital.

A What I am familiar with is there was, there was a

22 shipment that was to be sent to Loudoun Hospital that was
23 delayed. And Loudoun Hospital was then told that they needed
24 to pay for the Federal Express to get their package. And
25 that was unusual.

D. Wilson - Direct

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1 Q Did you pass through calls to Mr. Bjorn from
2 customers?
3 A On occasion.
4 Q Was it usual or unusual for Mr. Bjorn to refuse to
5 take calls from customers?
6 A I would say that he was pretty open to taking calls
7 from customers.
8 Q Did you pass a call through to Mr. Bjorn from a
9 Miss Linda Love at Loudoun Hospital?
10 A I attempted to.
11 Q And why weren't you able to?
12 A I was told to take a message.
13 Q By whom?
14 A By Mr. Bjorn.

MR. POCHUCHA: If I may have a moment, Your Honor.

Thank you, sir. That's all the questions.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. SILVESTRI:

Q Good afternoon, Ms. Wilson.

A Good afternoon.

Q Am I correct in my statement that you sitting here today have no personal knowledge as to why it was that on that particular day Mr. Bjorn came to you and said, ' don't put

Ms. Burns' calls through to Karen Biesemeyer?

A I am not sure I understand your question. I am sorry.

Q Well, as I listened to your testimony, I didn't get any testimony from you of Mr. Bjorn's reason why he gave you that instruction on that particular day, is that correct?

A Reasoning? No, I was just told not to patch calls through.

Q And you don't have any knowledge as to why he said that to you, right?

A No, that's not entirely true. I do have a little bit of knowledge as to why that situation came about.

And that was because there was-- The client, Loudoun Hospital, was waiting for a shipment, and it wasn't-- There was a mix-up or something had happened. It was being delayed. Something was going on. So, Ms. Burns had called the office several times to speak to Karen to find out what was going on.

Now, after this happened, that's when I was informed not to patch any further calls through to Purchasing from Ms. Burns.

Q Are you aware that Mr. Bjorn got a complaint from Ms. Biesemeyer that Ms. Burns was calling too many times on this account, that there was no change, and that she

was
25 bothering Ms. Biesemeyer to do her work?

D. Wilson - Cross

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1 That's what happened that day, wasn't it?
2 A Well, sir, I--
3 MR. POCHUCHA: Your Honor, I would object to the
4 question. There are about five questions there.
5 THE COURT: Objection overruled.
6 A I actually would have to disagree.
7 There were sales representatives that were actually
8 in the office that went back to Ms. Biesemeyer countless
9 numbers of times. And I answered the telephone. So, you
10 know, there was not, for that day, to the best of my
11 knowledge, a number of telephone calls that would have
12 exceeded the number of times a salesperson from inside the
13 Herndon office could just walk back to Ms. Biesemeyer's
14 office.
15 Q Isn't it a fact, ma'am, that Ms. Biesemeyer

went to
16 Mr. Bjorn that day in tears complaining about how Ms. Burns
17 was harassing her?
18 MR. POCHUCHA: Objection, lack of foundation, Your
19 Honor.
20 THE COURT: Objection overruled.
21 A I certainly don't know that that is a fact.
22 Q So, you don't know whether it happened or didn't
23 happen, is that correct?
24 A It would seem unlikely to me, but no, I don't know.
25 Q Do you know whether it happened or didn't happen,

1 ma'am?
2 A I do not.
3 Q Okay. Thank you.
4 Now, isn't it also a fact that-- Is it a fair
5 characterization that you put many phone calls from Ms. Burns
6 in through to Ms. Biesemeyer to check on orders, is that

correct?
A Many?
Q Many.
A On that particular day?
Q At the time that you were working for UniNet.
A Of course.
Q Many phone calls.
A When she would call, of course, I would put the call through.
Q Yeah. And she called many times, did she not?
A She would call an average amount of times. I wouldn't say I got a call from her that would be excessive or that would be more than usual.
Q And you knew during the time that Ms. Burns was employed by UniNet that she was complaining that her orders were being delayed? Did you know that?
A No, I did not.
Q You did not know that?
So, Ms. Burns never told you that her orders were

being delayed and she was complaining about it, correct?

A She would have no reason to tell me that except for, please put me back to Purchasing, I am having a problem.

Q The delay-- The check-- Excuse me. The order on Loudoun that you testified to in your direct examination, Loudoun was past due, and that's the reason why the order was delayed, isn't that correct?

A Sir, there were many accounts that were past due, and I have no knowledge as to why that account was being delayed.

Q Would you answer the question, please, ma'am?

The Loudoun account was past due, and that's why that order that you seem to remember was delayed, correct?

A I don't know that that is correct.

Q So, you don't know whether it is correct or not correct?

MR. POCHUCHA: Objection, he's harassing the witness.

A I don't know that it's correct based on the 60-day late period.

Q The what period, ma'am?

A I don't know that it is, that-- I don't know-- I am sorry. I don't know that based on your 60-day time frame, that's what's making the statement incorrect.

I don't know that there was a time frame that was

put on having the account being delayed or however, whatever.

Q This 60-day time frame that you just talked about, that's a 60-day rule that says that you can't ship accounts that are delayed, that are overpaid or overdue for 60 days?

A I am not aware of a policy such as that.
Q Well, what-- How did it pop into your head then?
A I believe that was part of your previous question.
Q You believe that I said 60 days, ma'am?
A You said that there was a late period.
Q So, where did you get the 60 days?
A I thought that-- I thought that was part of your question.
Q Isn't it a fact, ma'am, that there is a 60-day policy in effect at UniNet that you don't ship orders when the customers are over 60 days?
A That is not a fact that I am aware of.
MR. SILVESTRI: No further questions, Your Honor.
THE COURT: All right. Thank you, you may step down. You may be excused.
THE WITNESS: Thank you.
NOTE: The witness stood down.
MR. POCHUCHA: Michael Leresche.
NOTE: The witness is sworn.

MICHAEL LERESCHE, called by counsel for the

plaintiff, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Mr. Leresche, would you identify yourself for the Court, please.

A My name is Michael Leresche.

Q Where are you employed, sir?

A Entex Information Services, E-n-t-e-x.

Q And what is the nature of your employment there?

A I am a senior systems consultant.

Q Were you formerly employed at UniNet?

A Yes.

Q And during what period of time?

A It was a two-and-a-half year period. I don't remember the start and end dates. I think start was October. I remember the month, but I don't remember the year.

Q All right, sir.

A That should be available in the records, I would think.

Q Did you have occasion to observe Mr. John Bjorn during your term of employment at UniNet?

A Yes.

Q Did you have occasion to observe him and his interactions with men and women?

M. Leresche - Direct

A Yes.

Q Did you observe any distinction between the way Mr. Bjorn interacted with men and the way that he interacted with women?

A In what respect?

Q Any respect.

A Can I speak freely?

Q Yes.

A There was one instance that I remember in particular.

I held sort of a senior level technical position with the company. John and I were, would talk to each other freely about issues.

There was one instance that comes to mind

that he
was having an argument, shall we say, with Pat Burns. And I believe that he was being a little bit hard on her. And as the conversation was over, we both walked back down the hall, and I kind of questioned him on it.

I said, I think you are being a little bit hard on her. And he said, no, she just; just the way she does things, and she is messing up.

And that was kind of the end of the conversation, but I did express my concern that he was being a little bit hard on her.

Q Did you observe Mr. Bjorn's, other than that

occasion, observe Mr. Bjorn's interactions with Ms. Burns on any other occasions?

MR. SILVESTRI: Objection, leading, Your Honor.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Would you tell the Court the number of occasions,
if you can recall, that you observed interactions between Mr.
Bjorn and Ms. Burns?
A No other instances really come to mind. I think he
would interact with all the salespeople. He would treat some
others more favorably than others. But it seemed that he was
a little bit harder on Pat than most everybody else.
MR. SILVESTRI: Objection, Your Honor, speculation
and conclusion.
THE COURT: Objection overruled.
BY MR. POCHUCHA: (Continuing)
Q All right, sir.
Do you know what the policy was at UniNet regarding
technical services that UniNet was unable to provide
internally?
A They would usually find a contractor of sorts or
another resource from outside the company to fit that need.
Q Was that a usual or unusual thing for UniNet to do?

MR. SILVESTRI: Objection, leading, Your Honor.

THE COURT: Objection overruled.

M. Leresche - Direct

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BY MR. POCHUCHA: (Continuing)

Q You can answer it.

A It was always an option when we went in for a meeting, for a proposal. There were only a handful of times when we actually did get an outside contractor to fit the need.

Q Have you ever heard-- Strike that.

During the time that you were employed at UniNet, did you hear Mr. Bjorn make any statements regarding the relationship between UniNet and Southeastern Computer Consultants, Inc.?

A Yes.

Q Describe those statements to the Court, please.

A UniNet basically had the backing of Southeastern.
We had the resources that they had. If we needed to tap
those resources, they were available to us.
Q Are you aware of any occasions on which UniNet
actually did provide services in coordination with
Southeastern Computer Consultants?
A I don't know if they were directly working for
Southeastern. I think we went outside Southeastern to get
other contractors.
Q Do you have any knowledge of the networking needs
of Fort Detrick, Maryland?
A No.

M. Leresche - Direct

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Q Had you previously-- Strike that.
Prior to UniNet, had you worked for any other firms
that provided networking services?
A Yes.
Q Had you worked at a firm that provided

services at
Fort Detrick?
A No.
MR. SILVESTRI: Your Honor, relevance of this.
This is now his prior employment.
MR. POCHUCHA: I'm just about finished, Your Honor. I will withdraw the last question.
And I would like to consult with Ms. Burns for a moment.
Thank you, Your Honor, I have nothing further.
THE COURT: Cross-examine.

CROSS-EXAMINATION
BY MR. SILVESTRI:
Q Good morning, Mr. Leresche. Am I pronouncing your name right? Is it Leresche?
A Yes.
Q My name is Steve Silvestri. I don't think we have met yet.
A Mr. Silvestri.
Q In connection with Ms. Burns' case, did you supply

an affidavit that was drafted by her and faxed to you at your business or your home?

A Yes.

Q And you signed that affidavit after she drafted it and faxed it to you?

A Yes, sir.

Q Okay. Let's have this marked as Exhibit 99. Six paragraphs down, Mr. Leresche, don't you say there that Mr. Bjorn would display his temper at times to all employees, including yourself?

A Yes.

Q And don't you also say there that the difference between the men and the women is that the men would stand up to him?

A Yes.

Q And you meant by standing up to him that they would bark back at him, correct?

A Or have a valid case against what he was saying.
Q Right. Would answer his objections, right?
A Yes.
Q Or would accuse him of taking it too hard on them,
correct?
A Yes.
Q All right. Now, you were-- What was your job at
UniNet, sir?

M. Leresche - Cross

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A I was a senior engineer.
Q And those duties were to design or to approve the
specs or the technical aspects of the product that was being
sold by UniNet?
A Design, configure, install local area networks.
Q Right. So, you were out in the field a lot,
correct?
A Yes.
Q And would it be a fair statement to say that you

were out in the field more often than you were in the office?

A Yes.

Q And isn't it also a fair statement to say that you were particularly choosy about what our specs and what our equipment was that we would give to customers, correct?

A Choosy?

Q I mean, you would always opt or try to opt for the highest quality equipment, correct?

A Yes.

Q And isn't it also true that you had a preference against farming or shopping things out for service, correct?

A If it was not in my scope to accomplish that task, I would by all means get another resource to do the job.

Q After first passing judgment about whether that resource could do the job because they would be doing it in the name of UniNet, would they not?

A Passing judgment?

Q Yeah. Well, if we can't do it and we need to farm it out to somebody who could do it, then we are going to make a representation to the customer that the people we are bringing in will be able to do it, correct?

A Right.

Q So, you have to pass judgment about whether or not somebody could do it, correct?

A Yes.

Q And if they couldn't do it, you wouldn't recommend them, correct?

A Right.

Q And if the equipment was not up to your standards, you wouldn't recommend putting it in, correct?

A Right.

MR. SILVESTRI: No further questions, Your Honor.

THE COURT: Anything further?

MR. POCHUCHA: No, sir.

THE COURT: Thank you. You may step down. You may be excused.

NOTE: The witness stood down.

MR. POCHUCHA: Ms. Linda Love, Your Honor.

THE COURT: What is she going to say that we haven't already heard?

MR. POCHUCHA: She is a customer. She had worked

for Loudoun Hospital and will talk about the changes.

THE COURT: All right.

MR. SILVESTRI: May I be heard on that, Your Honor?

THE COURT: Yes.

MR. SILVESTRI: It is our anticipation that Ms. Love is going to testify that she has never been in UniNet, ever been at UniNet, and has never observed Mr. Bjorn and Ms. Burns together.

So, I don't understand how she could possibly

be
relevant here. Because this is not a case about a relationship between UniNet and Loudoun Hospital. This is a case about what happened to Ms. Burns at the workplace.

MR. POCHUCHA: Your Honor, I don't know what the Court's pleasure is in terms of a luncheon recess. I mean, it may make some sense for me to hold back Ms. Love until after I hear what Mr. Bjorn, if he testifies, has to say. And then in that event--

THE COURT: Well, that may be, but I--

MR. POCHUCHA: No, I know. All I am saying is if I do that, then the next witness will probably be--

THE COURT: It seems to me his objection is well taken, unless there is something you can tell me. The hospital wasn't paying their bill. That controversy has nothing to do really with the testimony here, does it?

MR. POCHUCHA: Actually, it has to do with the manner in which services were provided by UniNet before the retaliatory period and what, we would submit to the Court, is a retaliatory period and after the retaliatory period.

And then it also has to do with the manner in which Ms. Burns was singled out by Mr. Bjorn for the delivery of products in relation to the payment schedule.

We anticipate that she would provide evidence that--

THE COURT: Well, we have already heard about that. I mean, this witness isn't going to help you in that regard other than be cumulative.

I have listened to two, four, six, seven witnesses say essentially the same thing. I mean, that is usually four more than I would allow to testify.

MR. POCHUCHA: Yes, sir, I understand.

What I would like to do, what I would ask the Court

to do is to allow-- I would like to call Ms. Burns next, but I would like to have a short opportunity with her before that testimony. I don't know what the Court's pleasure is on a luncheon recess.

THE COURT: Well, it is about time to recess for lunch.

Is that the only other witness you have now?

MR. POCHUCHA: Well, I have Dr. Titus by way of

depositions. And those will be, I believe, my final direct witnesses, Your Honor.

THE COURT: All right. Then we will recess for lunch until 2 o'clock.

MR. POCHUCHA: Thank you, Your Honor.

NOTE: At this point a luncheon recess is taken; at the conclusion of which the case continues as follows:

MR. POCHUCHA: Ms. Burns will be my

next witness,
Your Honor.

NOTE: The plaintiff is sworn.

PATRICIA B. BURNS, the plaintiff herein called in her own behalf, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. POCHUCHA:

Q Ms. Burns, would you state your full name for the Court, please.

A Patricia B. Burns.

Q And your age, ma'am?

A Forty-eight.

Q Your marital status?

A Divorced.

Q And children?

A One daughter.

Q And describe your educational background briefly

for the Court, if you will.

A One year of college.

Q And your employment history, ma'am?

A I would take it back to Braniff Airlines for about eight-and-a-half years commencing in 1972-- No, 4, I am sorry, through 1984, I believe. No--

MR. SILVESTRI: Your Honor, how is her prior employment history relevant, Your Honor?

THE COURT: Objection overruled as long as it is just a background.

A 1974 to '82, I believe.

Subsequent to that I sold airplanes for a Cessna dealership for one year. Subsequently I worked for Honeywell for five years. And subsequent to that I worked for a computer company out of Minneapolis called Boffin Limited for approximately one year.

And subsequent to that I worked for UniNet, Incorporated.

Q How did you come to go to work at UniNet?

A I answered an ad in the paper.

Q And who hired you, ma'am?

A John Bjorn.

23 Q And do you recall the interview process?
24 A Yes.
25 Q Who was there, if anyone, other than Mr. Bjorn?

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1 And what did the interview process entail?
2 A I was interviewed first by Donna Gavitt, and then
3 my hire was approved by John Bjorn.
4 Q What were the terms of your hiring?
5 A I was hired as a sales representative with a base
6 salary of $25,000 plus commissions, which would be reduced
7 after six months, which is called a ramp-up period to gain
8 your commissions so that you could, you can sustain yourself
9 without that higher salary. And then it was reduced after
10 that to $19,000 a year plus your commissions.
11 MR. POCHUCHA: Your Honor, may the witness be shown
12 the plaintiff's exhibit book?
13 THE MARSHAL: She has it.

BY MR. POCHUCHA: (Continuing)

Q Turn to Tab 58, please. Do you have it there?

A I need my glasses.

THE COURT: We don't have a jury here. Why don't you go through your questions, and then if there are exhibits-- Give her her glasses if she would like to have them, but there isn't any need to run through these exhibits like we were taking a deposition.

Go ahead and get your testimony out, and if you want to draw her attention to some exhibits, just do so.

MR. POCHUCHA: Just enter them at the conclusion of her testimony?

THE COURT: Are there objections to any of them?

MR. SILVESTRI: We have, both of us have filed objections with the Court in terms of the exhibits.

We have had a conference, Your Honor, with respect to these objections.

Some of them have hearsay issues and some of them have relevancy issues.

THE COURT: Hearsay I am not going to listen to. There is no jury here. Hearsay is not going to bother me.

MR. POCHUCHA: Judge, would it be all right for us, after her, the conclusion of her testimony, Mr. Silvestri and I perhaps--

THE COURT: Sure, we can do that. If he doesn't have any objection, we will admit them all now. Whichever way you want to do it.

MR. POCHUCHA: All right, sir. Thank you.

BY MR. POCHUCHA: (Continuing)

Q Tab 58 is a letter that sets forth your-- You don't need to go over, we are not going to go over that. But is a letter that sets forth your employment conditions,

21 correct, Ms. Burns?
22 A That is correct.
23 Q All right. Describe the course of your employment
24 at UniNet commencing with 1990.
25 A I started UniNet in December of 1990 as a sales

1 rep, as I said. And I continued working there through 1992.
2 Is that--
3 Q That's fine. What were your contacts-- Who was
4 your direct manager at that time?
5 A My first manager was a woman named Donna Gavitt.
6 And the second manager I had was Todd Heidelberger.
7 I had Donna Gavitt I believe for just a few months,
8 and then it became Todd Heidelberger through the remainder of
9 my first term of employment.
10 Q And did Donna Gavitt and Todd Heidelberger attend

sales calls with you?

MR. SILVESTRI: Objection to the form of the question. Leading.

MR. POCHUCHA: I'll rephrase it, Your Honor.

BY MR. POCHUCHA: (Continuing)

Q Who attended sales calls with you, if anyone, during the initial course of your employment? When I say the initial course, I mean the first year.

A During my first year of employment it was-- Three people were available or told me that they were available to go on sales calls. And that would be Donna Gavitt, Todd Heidelberger and John Bjorn.

And, however, during the first year of employment, it was John Bjorn the first year.

Q Did you request that Mr. Bjorn attend sales calls

with you during the first year?

MR. SILVESTRI: Objection to the form of the question, leading.

THE COURT: Objection overruled.

A On occasion I would ask him when I felt that his expertise and his position might help close a sale. And when I say that, I mean that on large sales that weren't just a typical person buying a computer, say, I could handle that kind of call.

But if it were more technical-- But more than that, especially, John Bjorn had the capability, being the president of the company, to-- Sometimes questions would come up during a sales meeting as to how much service are you willing to provide us if you win this bid, for example. And no one had authority to offer them and say yes or no except for John Bjorn.

And in certain instances if he wanted the deal, he would extend them extra service or maybe cut

breaks on their
19 price for it. But we were not, we couldn't do that on our
20 own.
21 Q Did you have target customers? In other words, did
22 you market to government? Did you market to business? Did
23 you market to schools?
24 A We marketed to commercial and government accounts.
25 Q All right. Did you have occasion to either discuss

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1 with Mr. Bjorn or hear Mr. Bjorn make any statements
2 concerning the relationship between Southeastern Computer
3 Consultants, Inc. and UniNet?
4 A Yes.
5 Q Would you describe for the Court the statements and
6 discussions of Mr. Bjorn.
7 A Okay. Well, when we would go on a sales
8 appointment, especially during my initial six months

when I
9 was basically a new employee, Mr. Bjorn would conduct the
10 sales meeting by giving what he called his dog-and-pony show,
11 which was an introduction to UniNet. And then told the
12 customer about UniNet and the background and how we were
13 organized and what kind of services that we could provide.
14 And that would be computer sales basically and networking and
15 maintenance.
16 And he would in this dog-and-pony show mention that
17 we were owned by Southeastern Computer Consultants, who was a
18 company that provided government contracts. And they had a
19 lot of expertise that we were free to pull from. And that's
20 about it.
21 Q All right, ma'am.
22 And during the period that Mr. Bjorn was
23 accompanying you on sales calls, were you provided with any
24 other assistance or attention by Mr. Bjorn?

25 A Yes, I was.

1 Q Describe that for the Court, please.
2 A Mr. Bjorn seemed to take a liking to me in the
3 beginning. And he paid extra attention to me. He would hang
4 around my desk talking about, sometimes talking about the
5 problems in his marriage, other times asking me out for
6 drinks, and basically just spending an inordinate amount of
7 time around my desk.
8 You know, it was nice because he was assisting me,
9 and he was a nice person, but he did pay, you know, what I
10 thought was a little bit overboard on his offering of his
11 services to me particularly.
12 There were very few people at the time. But as
13 they came and went, I noticed that he didn't provide that

kind of assistance to them.

Q Did that become a concern of yours?

A Yes, it did.

Q In what way?

A Because I felt like he might have other motives other than just liking me as a person and just helping me, thinking that I was, you know, needed help or--

Q Did you discuss those concerns with anyone else in the office?

A No, I did not. I don't believe I did.

Q Did anyone else in the office discuss with you the need for assistance of Mr. Bjorn?

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A I am sorry. Can you repeat that?

Q Did anyone else in the office request the assistance of Mr. Bjorn through you?

MR. SILVESTRI: Objection to the form of the question. It calls for a hearsay answer.

MR. POCHUCHA: It is not offered for the truth,

Your Honor. It's offered for the fact that it happened.

THE COURT: It can't be of much relevance then.

Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q All right. How did you progress during the time that Mr. Bjorn was providing you with the assistance?

A I am sorry?

Q How did you progress during the time that Mr. Bjorn was providing you with that assistance?

A Oh, I became-- I became probably the top producer eventually--

Q All right.

A --in the company. If not, I mean, there may have been-- I don't know. I don't want to--

Q What is a senior sales representative?

A A senior sales representative, you can be promoted to senior sales representative after you have exceeded your quota three consecutive months.

Q And what is this that I am holding up?

A That is my plaque that was presented to me for obtaining the senior sales rep position in December, I believe, of--

Q So, in December of 1991?

A --'91.

MR. POCHUCHA: Your Honor, we would move this in as an exhibit, but I am sure you don't need it right now.

THE COURT: It is admitted.

BY MR. POCHUCHA: (Continuing)

Q Well, did that relationship with Mr. Bjorn continue through your first term of employment with UniNet as you described it?

A No.

Q Okay. What, if anything, caused--

A You mean the first term, the first--

Q Yes, ma'am.

A Okay. Well, eventually I did accept to go out for drinks with Mr. Bjorn. And he had been-- He would ask me a

lot to go out. And I was dating someone else. And besides that, I had a daughter that I had to take care of. I am a single parent.

And so, I could make, not excuses, but-- I mean, they were legitimate excuses, but I did feel after some time that I should, because he was, you know, helping me and stuff, and he was a nice person, that I did agree to go one

time when there were other people who were supposed to be there.

One in particular was Michael Leresche was standing there, and he said he would be going to the Happy Hour with us. But I didn't feel it appropriate really to go with Mr. Bjorn because he just-- I mean, even being a nice person--

It is not that I am, you know, uptight about it, it was just--

Q Did you go?

A Yes, I did.

Q And where did you go and who was there?

A Oh, okay. Well, when I went, it was only Mr. Bjorn there.

Q Did you stay?

A Yes, I did.

Q And what, if anything, occurred while you were there?

A We sat at the bar and we had a few drinks, three beers, I believe it was. And I felt that I would take advantage of the opportunity of being there with him to talk about some more sales techniques and leads that I had and his opinion on how to, you know, how to close them or things along those lines. Whereas he kept turning it back to personal discussion.

And so, I would keep bringing-- I felt, like I

said before, I felt like he had an interest in me possibly, or I did feel that. And so, I didn't want-- I felt it was better to keep the subject business.

MR. SILVESTRI: Objection, Your Honor. I don't understand how this particular person's feelings about whether someone had an interest in her are relevant to the case.

They are conclusory and they are opinion. They are not fact. They are her feelings.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q How long did you stay there?

A To my best recollection right now, I would say maybe an hour.

Q And what, if anything, did Mr. Bjorn-- You said you tried to move it to business. He tried to move it to personal.

What was the outcome of the conversation?
A Well, the outcome of the conversation was basically-- Well, that I had-- I was going to have to go
home, that it was time for me to go home.
But during the, during the course of the meeting or
the occasion for drinks here, a friend had come up to him,
and they had gone away from where I was sitting. And they
were laughing and things. And he came back and John said to

me that he, that his friend thought that we were having an
affair and thought it was funny.
And that was something that I didn't want that appearance to be anyway, as I had said before, in the office. And so, I didn't think it was very funny.
And, you know, after three beers it was getting a
little bit later and-- Oh, and also at the time when he kept
talking about personal things, I decided to let him know, I

felt this might cause him not to be interested in me, because at the time he was 29 years old, and so I told him at that point that I was 40 years old.

And he was very shocked and pretended to fall off his stool and that. And I said, well-- Eventually I just said, well, you know, I am leaving, I have to go home to my daughter now.

Q When was the next time that you saw Mr. Bjorn?

A Probably the next day at work.

Q Was his-- Was your relationship the same at that point?

MR. SILVESTRI: Objection to the form of the question, leading.

THE COURT: Objection overruled.

A The relationship changed in that the flirtations stopped.

Q How did you feel about that?

A I was glad.
Q All right. Anything else?
How was your sales production from there on?
A I proceeded to-- My numbers proceeded to grow. I developed quite a lucrative client base which was generating really good commissions for me.
And so, I was pretty busy doing that and, you know, obtaining new customers. But my sales, sales numbers basically rose and peaked about the middle of the following year, I would say, or sometime around then.
Q Did there come a time when you requested assistance from Mr. Bjorn and it wasn't provided?
A Yes.
Q Describe that for the Court.
A Well, it began to-- It began to be that when I would need his help, as I stated before that you do on occasion, you know, need his help because he is in

control of
18 a lot of the company, that he wouldn't respond to me. And I
19 couldn't get answers from him.
20 Q What do you mean he wouldn't respond to you?
21 A Well, he would just-- Like if I would go up and
22 say, John, can I give-- This customer wants me to, say, for
23 example, provide another kind of hub than what we normally
24 use-- This is not the real instance.
25 But he would be the one to say, yes, that's not our

1 standard one, but in this instance, this is a great account,
2 possibility.
3 But he wouldn't answer-- You know, it was as
4 though he was-- He didn't want to help me anymore.
5 Q All right. Did you have any verbal exchanges in
6 the office?

A Yes.
Q Describe that for the Court.
A He began-- Eventually, you know, after that phase, he began to-- He began to belittle me and berate me about my job performance in front of others.
Q And what, if anything, did you do in response to that?
A I just tried to deal with it.
Q All right.
A Oh--
Q Have you ever had any medical treatment for emotional problems?
A Yes.
Q Describe that to the Court just briefly.
MR. SILVESTRI: Relevance, Your Honor.
MR. POCHUCHA: Relevance is the impact upon her of the acts of the defendant, Your Honor.
THE COURT: Well, doesn't she need to tell me that's the case before we get involved in the--

MR. POCHUCHA: Go through the circumstances and come to that at the end?

THE COURT: I don't know why she went to seek treatment. You have got to lay some kind of foundation that it is related to what we are talking about here.

BY MR. POCHUCHA: (Continuing)

Q Well, did the statements of Mr. Bjorn have an impact upon you?

MR. SILVESTRI: Objection to the form of the question, leading.

THE COURT: Objection overruled.

A Yes. It upset me a great deal because, mainly because they weren't true.

Q All right. Had you experienced such, a situation similar to what you were experiencing with Mr. Bjorn prior to that time?

A No. You mean prior to when he started treating me?

Q Yes.

A No. However, I did observe the way he was treating some other salespeople, saleswomen in the office too in relation to me, if you would like me to explain.

MR. SILVESTRI: Move to strike the answer as nonresponsive, Your Honor.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Were you the only person who was receiving that treatment from Mr. Bjorn?

A The belittling?

Q Yes.

A The only person at UniNet?

Q Yes.

A Yes.

Q All right. Did you observe Mr. Bjorn's conduct with others at the same time?

A Yes. Mr. Bjorn does have a temper, and he has displayed it with people in the office.

The difference between the way he treated me and the way he treated them was it was a continuous for-no-reason berating of me. Whereas any manager, especially in a stressful office like that, gets angry sometimes, and you yell, and that's the way it was in that office. You know, you get uptight. You have got a delivery and things like that.

And he would yell like a lot of managers I have had would yell. But I have never felt-- And I never observed him-- Almost as though on some days where he was like almost stalking me to see something that I was doing and then correct it, like correct it and yell at me about it.

Q What, if anything, did you do about that?

A Well, it got to the point where I really, I was

a
basket case over it. And the last time that it happened, it was so bad that I had to leave the office. I was in tears, and I had to walk around to gather myself. And I had an important customer appointment soon thereafter, and I was trying to compose myself to get myself back together.

And I went into my supervisor and I said, listen, you know, this is terrible. I am supposed to be going on this appointment. Look at me. Look at the state I am in.

And Todd said, why don't you just, you know, try to go and gather yourself.

And I ended up going with-- Maureen McGarvey said that she would go on--

MR. SILVESTRI: Objection, hearsay, Your Honor. Ms. McGarvey is not a supervisor.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Tell the Court what you told Todd was happening to you.

A Eventually I told Todd that I felt like I was being harassed.

Q Did you tell him it was sexual harassment?

MR. SILVESTRI: Objection to the form of the question. Leading, Your Honor.

THE COURT: Objection sustained.

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BY MR. POCHUCHA: (Continuing)

Q Just go ahead and explain to the Court what you told him.

A I told Todd that I, that this had to stop. This had gotten to the point where, you know, it was really distressing. And this was not acceptable.

And I said-- And he asked me-- And I said, I have to insist that you do something about it. And Todd said, okay. And he closed the door and he got out a

notebook. And
he said, so, you feel like you are being harassed. What
else? And, I said, well, you know-- And he said, what kind
of harassment? He goes, I don't know really how to deal with
this because this has never happened before. But he says--
I said, well, you know, you have to do something.
But anyway. So, he asked me what kind of
harassment it was. And he said, is it sexual harassment?
And I said, I don't know if it is sexual harassment. I don't
know what kind of harassment it is, but I am being harassed,
and I want it to stop.
Q What, if anything, was done by UniNet in response
to that meeting?
A Todd did go to John behind closed doors. And when
he came out of the office, he said that John wanted to see
me.
And I can't-- That's my best recollection. It may

have been the next day. I am a little bit confused on that.

Q Did you ever meet with John?

A I did meet with John.

Q And tell the Court what happened at that meeting.

A John said that it was a serious accusation and why would I do such a thing. And why would-- You know, he says the problems with my customers-- Which was another complaint that I told Todd was that my orders were being held and prioritized, not put in the prioritization the way they were before and the way everybody else's were, and I was losing accounts.

And he said that these problems were my problems, that I didn't know how to deal with my customers, and I gave them unrealistic expectations and that's why they

were
15 complaining so much. Not that the service wasn't being
16 provided or my orders being held.
17 Q Is the memorandum at Tab 3, and just look at it to
18 satisfy yourself of what it is, a description of the problems
19 you were experiencing at that time?
20 A Yes, it is.
21 Q Did you meet with Leo Harris about the situation
22 with Mr. Bjorn?
23 A I met with Leo Harris. He came into the office one
24 day shortly after this time frame, and we were about the only
25 ones in the office. And Mr. Harris had always told me that

1 he had an open door policy and that I was welcome to come to
2 him with any problems or anything. We had a great
3 relationship.
4 And so, I asked him if I could talk to him

about
something. And we went in an office, and I told him that my
numbers had dropped and that I was afraid I was going to get
fired. And he said, why, what's going on? I said, well, my
customers are complaining about the service that I am not get
getting, you know, from UniNet.
And he says, well, you are not going to get fired.
So, you don't worry about that.
And I said, well, okay.
Q Let me ask you, Ms. Burns, did you have a discussion with Mr. Bjorn around that same time regarding
your expected income for 1992?
A Yes.
Q What did he say?
A He told me he had to fill out-- I had asked him to
fill out a mortgage statement. I don't know what you call
it. But anyway, they needed a mortgage statement from me
saying what my projected earnings were, were to be that year

22 for the mortgage company.
23 And John Bjorn asked me to show him my last pay
24 stub. And he-- And I showed it to him. And he calculated
25 what my year-to-date earnings were and did a calculation and

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1 divided it and then extended it out. And he put down $80,000
2 were my projected earnings for the mortgage company.
3 Q And did you stay with UniNet for the balance
4 of '92?
5 A No, I did not.
6 Q Was there a particular event that caused you to
7 depart?
8 A Well, I obviously was not going to get the support
9 from Mr. Bjorn anymore. My customers were falling off the
10 wayside because they were complaining constantly that their

orders weren't on time.
You just can't make it without the cooperation of the company, without John Bjorn, because you just might-- I had to quit. And I could not take the humiliation. And so, I did quit.
Q All right. Did there come a time when you were re-employed by UniNet?
A Yes.
Q And describe briefly for the Court what the circumstances of that re-employment were. In other words, how it occurred and what the terms were.
A Todd Heidelberger, when I told him I was leaving UniNet, asked me if I could stay awhile longer and make it, you know, even with the harassment, stick it out because he said there was supposed to be a Frederick office opening and

that he was going to be the manager. And I said, there is no way, I said, that I can stay in this place one more day.

And then during the time period that I had left and between the time I came back, Todd had contacted me or spoken to me a couple times about wanting me to come back, that it was a great office, fun to work in and I could resume my earnings that I had before--

Q Did you decide to go back?

A I did decide to go back.

Q And what, if anything, did Todd tell you about the terms of your employment?

A Okay. Well, we had a couple of discussions about my hesitation of going back first. And the main thing was John Bjorn, of course.

And he explained to me that the office was fairly autonomous from him. That he would be interacting with John Bjorn and that I would have very little, have to have

very
18 little contact.
19 And I had a question about territories because I
20 didn't want-- Frederick just didn't sound like a very big
21 place to me. And he said, oh, no, you have unlimited
22 territory basically except for Northern Virginia, which is
23 covered by the Herndon office.
24 And I thought, well, that sounded pretty
25 lucrative. And he said, I will give you all the assistance

1 you need to get back to where you were.
2 And then there was some, you know, some salary
3 discussions. And I was hired back. We negotiated a deal,
4 you know, whereby I would be a senior sales rep again and
5 paid at that initial base salary for the ramp-up period of
6 $25,000.

Q There is a document in the exhibit book setting forth the terms of your re-employment?

A Yes, there is.

Q And how did it go? Did you agree to accept the job?

A Yes, I did.

Q And how did it go between you and Todd?

A Great.

Q All right. Did you have any contacts with Mr. Bjorn prior to Todd's departure?

A To my best recollection-- Direct contact?

Q Yes, ma'am.

A I don't think so. I think he-- I don't recall having any direct contact.

Q Did you have any problems of any nature whatsoever with any management personnel or any coemployees during the period from your re-employment in October until Todd's departure in March of '94?

A I am sorry, can you repeat that? I am sorry.

Q Did you have any problems with any coemployees or any management or anyone from your--

A No, no.

Q All right. What, if any, conversations did you have with Todd when you learned of his imminent departure from UniNet. Let me rephrase it.

Did you ask Todd to do anything?

A Yes, I did. I was very nervous about Todd leaving. And I said, you know, when you-- That was another thing that he told me, that he was in here for the long haul. Because I was worried. Well, you are not going to get me up there and then leave me. And he said, oh, no, I'm in here for the long haul.

And so, when he resigned, and Todd and I had a great relationship where we joked back and forth and things like that, I said, you dirty rat, you know, and-- Anyway. So--

Q When you say-- You heard the question to Mr. Heidelberger about commuting. Did you ever commute to and from work with him?

A No. There were a couple of occasions, because he lived sort of-- He had to pass by my, the area where I lived.

Q Where were you living at the time?

A I was living in Bluemont, Virginia. And he was

living in-- His address was Bluemont, but he lived over the mountain from Bluemont.

And on a couple of occasions his car broke down. He asked-- He would borrow a car, and he would ask if he could ride the rest of the way with me. I would say two, maybe three occasions that happened.

Q Okay. And so, what did you ask him to do in

anticipation of his leaving?

A I asked him if he would tell Leo about the situation between John Bjorn and myself.

Q And what did he say to you?

A He said he would think about it.

Q Did you ever discuss it with him again after?

A Yes.

Q What did he tell you?

A Well, I knew that he had gone over to talk to Leo about leaving. And I said, did you tell him about John? And he said, he said no.

Q Did you ever talk to Leo about your situation with John after your return and before filing any formal notice with the corporation?

A I had raised a couple issues with, having to do with, having to do with-- Yeah, I did talk to-- I talked to him about the problems that I was beginning to have.

Q When did you begin to have problems?

A Just after Todd left.
Q All right. Tell the Court your first problems with John Bjorn after Todd left.
A Well, first of all, he-- The office had only about three or four, five people. But on one occasion-- He became the acting manager, is what happened.
Q Did you have a discussion with anybody about who the manager was to be, the new manager?
A Oh. Yes.
Q Were you offered the position?
A Well, I had asked Leo Harris what he was going to do about the management position since Todd left. And he said, well, of course I am going to offer it to you. And I said, oh. And I said, well, thank you, I appreciate that.
And so, Bjorn came up one day and said, listen, you know, casually, you know, in the warehouse said that, you know, you are welcome to apply for the position,

but you
18 don't strike me as somebody who would really, you know, want
19 to be in that position, and it's only going to pay $35,000 a
20 year. And, you know, and didn't paint a very good picture.
21 Which didn't matter, because I-- I mean, I thought
22 about it. I would liked to have been the manager, but there
23 was no way that I could have reported directly to Bjorn.
24 So, I said no.
25 Q After that did you have occasion to--

1 A Excuse me. May I say one more thing about that
2 conversation?
3 Q Yeah, complete the conversation.
4 A I'm sorry. He also said that if I did take the
5 job, that he would be on me constantly.
6 Q All right. After that, what was the next contact
7 you had with Mr. Bjorn?

A I am not sure if this was after or before. But there was an occasion where, right after he became the acting manager, just the first day or second day, he had come up to me at the copy machine, I was making some copies, and he said-- No one else was in the office. And he said, have you heard that I am separated from Pia? Who was his wife. And I said no.

And he said that-- He said, yeah. And I said, well, I am sorry to hear that. I'm sure you will be able to find someone.

And he says, oh, I can't seem to find a woman who can so much as boil a pot of water.

And these aren't exact-- I mean, this is the, as best I can recollect what he said.

And that he was sick of women who all they were interested in was their careers.

At which point I just said, oh. And I finished copying and walked back.

But I was aware at the time that he was dating somebody. And I felt like, well, why isn't he-- He acted like he was looking for someone to go out with. And I knew he was dating somebody because I had been told that.

Q Who told you that?

A Trung Le.

Q What did he tell you?

MR. SILVESTRI: Objection, Your Honor, hearsay.

MR. POCHUCHA: Trung Le--

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q Who is Trung Le?

A Trung Le is the lead technician for the Herndon office.

Q Did you experience any-- There came a point in time when Pam Edelman became the manager of the Frederick, Maryland office, correct?

A That's correct.

Q Between March and May when she became

manager, did you have any other contacts or difficulties with Mr. Bjorn?

A Well, he started talking about why was Todd-- Why was I calling on customers down in D.C.? And that he was going to try to, you know, take that area away. And it would be settled when the new manager came, something along those lines.

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But he did have discussions about changing the territory that Todd had agreed, that I had agreed to come back under.

Q Did you sell cabling as well as hardware?

A Yes.

Q Did you sell cabling to the AOTA?

A I tried to.

Q Describe briefly what you mean by that statement.

A I had gotten a very large opportunity to sell,

to
do a cabling job for AOTA, which is American Occupational
Therapy Association, I believe. And it was to-- They were
moving into a new building, and they needed cabling for
networks throughout their whole building. I mean, it was a
huge opportunity.
And, fortunately, there were only three bidders.
So, that gave us-- Sometimes these companies will go out for
ten, 12 bids. But I got my foot in the door and got the
opportunity to be one of the three bidders for this cabling
job.
And cabling jobs have been known, I remember John
saying he really liked cabling jobs because they had the
highest margins and things like that.
And, oh, did I finish my answer?
Q Did you obtain assistance on that bid from Mr.
Bjorn?

A So, I got the opportunity, and I told John about it. And he says-- I said, and there's a bidders conference. Would you go with me? And he said, well, I can just stop by there because it is sort in the area of where I live or on my way to work.

And I gave him the information as to where it was, when it was. And the reason I asked him to go-- Because it was one of those large opportunities that John Bjorn can, can make the deal on.

And so, anyway he did not, he didn't go.

Q After Ms. Edelman became the manager, did your life as a salesperson become easier?

A No.

Q What difficulties, if any, did you have during your tenure under Miss Edelman?

A Well, Miss Edelman was hired-- She had

never been
17 in management before, and she was very-- Well, she was
18 totally unfamiliar with the system that UniNet--
19 MR. SILVESTRI: Objection, Your Honor, lack of
20 foundation for the statement that she had never been in
21 management before.
22 THE COURT: Objection overruled.
23 A And she was not familiar with the policies and
24 procedures and things of that nature.
25 John Bjorn was supposed to be sort of training her,

1 but he, I only saw him up there with her, you know, one or
2 two times, if even that.
3 And so, I was sort of trying to help Pam out and
4 get her sort of familiarized with the system that UniNet
5 worked under.
6 And then--
7 Q Had your territories remained the same after

Miss
Edelman came to work as manager?
A No. They were changed.
Q How were they changed?
A They were changed twice.
First, they were changed that I would only be allowed to call on the I-270 corridor, which is just outside of Frederick down to Washington, D.C., which did not include Washington, D.C. And later Mr. Bjorn cut it back to just the small part of the I-270 corridor which included one zip code in Rockville.
Q What effect-- What impact, if any, did that have on your sales?
A Well, it certainly limited my ability to go after a lot of accounts that I would have been allowed to go on before. And the reason I agreed to come back was I sort of liked to go for the big accounts, and they are very limited in that area.
Q Did you have any other-- During the period

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April to November, did you maintain any record of the incidents which occurred with your sales?

A Oh, in October I did.

Q What did you do in October?

A Well, in October-- That was another thing. I started ramping up, and I was doing okay. But my orders started becoming later and later, and I was losing customers.

In October our quoted delivery time, as provided by Mr. Bjorn's instructions, is to quote a five to seven business-day delivery time.

And in the month of October mine were being delivered sometimes 21 business days. And I was just overwhelmed with customers calling, complaining, wanting to know where their order was and things of that nature.

And subsequent to the month of October, I had so

many complaints that I lost three accounts. And they just called me up and said, we can't, we can't accept these kind of deliveries.

I mean, they could go down to a Best Buy and buy a computer, you know, or something like that. But it just wasn't competitive with any other--

Q You don't need to--

A Okay.

Q Are you aware of whether or not other sales

representatives at UniNet experienced the same problems with delays in delivery?

A Yes, I am aware. They didn't.

Q All right. What, if anything, did you attribute your-- Strike that.

Did you come to learn of a reason why your orders were delayed?

A Well, I felt that John Bjorn was purposely mis--

Or not prioritizing my orders, as he had done in 1992.

And by the way, that was, also someone told me he was doing that.

Q Did you bring that concern to Mr. Bjorn's attention?

A Yes, I did.

Q When was that?

A Well, I would either bring it to Pam's, you know, attention or to John directly or-- You know, I definitely made him aware of it.

Q Did you have a meeting concerning it?

A Yes. So, eventually he-- Pam told me that he was going to come up for a meeting to discuss some of the problems that I was having with late deliveries and some of the problems that the other two male sales reps were having, that they thought were they were having. And just basically an office thing or problems that Pam might be having.

Yeah, he did come up and have this meeting.

Q And describe what occurred at that meeting, if anything.

A Well, John was, made it known that he was very angry about another incident that happened prior to this, which I had asked for a salary review. And he screamed at me on the phone and berated me in front of my supervisor, Pam Edelman, accusing me of being deceitful and things of that nature. And really-- I mean, loud to the point where it was, it reminded me of what had happened in 1992.

And so, anyway, shortly thereafter he decided to arrange this meeting. And he had never held a meeting up at, a sales meeting before this in Frederick. And I knew John well enough by now that he was coming up to-- He was mad at

me and that he was going to come up. And I just knew it because I know him so well, how he treats me, that he was going to single me out and he was going to yell at me.

MR. SILVESTRI: Objection, Your Honor. Half of this, half of this answer was mere opinion and conclusion, and I move that it be stricken from the record.

THE COURT: Objection sustained. That was a conclusion.

BY MR. POCHUCHA: (Continuing)

Q Tell us what happened at the meeting when Mr. Bjorn got there.

A He immediately started out by saying, pointing his finger at me-- He was pacing back and forth just prior to the meeting. And then when everyone sat down at

the table,
he approached the table. And he pointed his finger at me and
said, there are some people around here who seem to think
that their orders are being held, and started just ranting
and raving as though that was his sole purpose of coming to
the meeting.
And he also said, if you don't like it, why don't you go get a job selling shoes.
And it was very humiliating because it was in front of my boss and it was in front of the other sales reps in the office.
Q What was the outcome of that meeting?
A Nothing ever really happened, but a couple things did.
I said, you know, what is the delivery time, you know, in Herndon? What kind of delivery time are they having in Herndon? And he said, well, you know, I am not sure. And I suggested, well, could we call up Lyons, John

Lyons. And
21 Mr. Bjorn took the speakerphone and called up John Lyons and
22 asked him, well, how long is it taking-- Because he is the
23 manager, sales manager down there. How long is it taking
24 your people to get equipment?
25 And John Lyons said--

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1 MR. SILVESTRI: Objection, Your Honor, hearsay.
2 THE COURT: Objection sustained.
3 BY MR. POCHUCHA: (Continuing)
4 Q Was there a further discussion about any difference
5 in the timing between deliveries in Frederick and delivery in
6 Herndon subsequent to Mr. Lyons' telephone call?
7 A Yes.
8 Q And what, if anything, did Mr. Bjorn say about Mr.
9 Lyons' telephone call?
10 A He said that even though John said that, he must be

confused. He said that, you know, John--

Q Don't tell us what John said. Just tell us what Mr. Bjorn said.

A Mr. Bjorn said that John must have not understood his question.

Q All right. Let me go back for a second.

You said Mr. Bjorn was angry about a previous incident that involved your salary request.

Tell the Court very briefly about the salary request, who it was made to and who responded.

A I asked for a salary review. It was on my anniversary. And I requested it to Pam Edelman, my immediate supervisor.

She turned-- She said that she didn't think that she would give that to me. And I said, Could I speak to John

Bjorn about it? And she said, oh, sure, why don't you just fax him a memo requesting to meet.

And so, I faxed him a memo, and she-- Oh.

She had spoken to him first. And he said, sure, I will meet with her, but I am not probably going to reverse that decision.

And I said, well, you know, that's fine, I would still like to meet with him.

And so, she-- So, I faxed down a memo for him. He called her back and said, okay, tell her that I will meet with her the next time that I come up from Frederick, to Frederick.

And so, I waited for the time for him to come up to the Frederick office. And he did come, but he didn't ask to meet with me. And subsequent to that I had a reduction in my paycheck, which is what I wanted to talk to him about in the meeting.

And as a result of that I went to Leo Harris, who had always said, you know, if I had any concerns or any

19 issues, that I was welcome to come over and talk to him. So,
20 I sent him a memo asking if I could have a salary review.
21 Q Did Mr. Harris respond to that memo?
22 A No, he didn't.
23 Q Who responded to the memo, if anyone?
24 A The person who responded to the memo was Ed Bjorn,
25 John's father.

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1 Q What was Ed Bjorn's position with UniNet at that
2 time?
3 A He didn't have a position with UniNet.
4 Q Did he have a position with Southeastern Computer
5 Consultants?
6 A Yes, he did.
7 Q What was that position?
8 A President.
9 Q And where did your meeting with Mr. Ed Bjorn take
10 place?
11 A At his office at Southeastern Computer

Consultants.

Q And the relationship of Ed Bjorn to John Bjorn is what?

A He is his father.

Q What was the outcome of your meeting with Mr. Ed Bjorn regarding your salary increase?

A Well--

Q Or lack of decrease, rather.

A Well, first of all, Mr. Ed Bjorn was concerned because I had stated in the memo that I tried to, you know, talk to other-- Or to John Bjorn and Pam about this, and now I was bringing it to him because of John didn't respond to me-- Because I wanted to let him know why-- I wouldn't go directly to Leo. So, since John didn't respond, I did. And I wanted to explain that.

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And then I wanted to outline a few of the reasons

in the memo, justifications for asking for, that my salary be--

Q What was the outcome of your meeting with Mr. Bjorn?

A Okay. He said, Well, before I determine this, I want to talk to John Bjorn because I am concerned why he didn't answer, why he didn't meet with you. And he says, I am going to go down to Herndon, and I will get back with you in a couple of days.

Then he came back and he called me over, and he said that Mr. John Bjorn had never gotten my fax. And that the reasons that I was giving for requesting a salary, not an increase, but a, but-- Not a decrease that was supposed to happen. And that he basically wouldn't let me say.

And he said that they were unjustified. And, therefore, they-- No, he is denying that. He said, it is denied. And Pam Edelman was in the office, and we walked

out. And Pam and I-- Oh, I said to Pam, I said, I am sorry I ever even asked for a review.

Because the way he was treating me was very, very degrading. I mean, just very, as though I didn't have a right to even say, explain really what my reasons were.

And Pam said, well, we know where he gets his personality, or--

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Q All right, Ms. Burns. Did you have occasion to, following the November meeting, address your concerns with Mr. Bjorn in writing to UniNet?

A Yes.

Q And that memo is included among plaintiff's exhibits?

A Yes.

Q And what did you tell-- Essentially without reading the whole memo, what did you tell UniNet, and who did

you address the memo to?
A I addressed the memo to John Bjorn.
This is the memo on November 23?
Q Yes.
A I addressed the memo to John Bjorn that I felt that he was harassing me. I felt that his, that my orders were being held, that he was causing extreme emotional distress because of this. I have lost accounts. He seems to--
Q It is at Tab 34.
A Okay.
Q When you get there, you will notice that there a lot of, there are a number of people copied on the bottom of that memo, and the Court can read this memo and you don't have to go through it all.
But when you get there, tell the Court why you copied the individuals that you copied.

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A Because they were his-- There was no one else at

UniNet who was-- I wanted the upper management to know what kind of problems I was having with him and my boss.

Q What, if anything, was done in response to your mailing of that memo?

A Oh. I was asked by Pam Edelman that she said that, that they wanted to meet with me over at Southeastern regarding this memo.

Q Who is they?

A Lorie Morrell and Ed Bjorn.

Q What position did Lorie Morrell hold with UniNet at that time?

A None.

Q What position did she hold with Southeastern Computer Consultants?

A Personnel.

Q Did you have a meeting-- Did you have a meeting, and where did it take place?

A I had a meeting in a conference room, as I recall, at Southeastern.

Q What was the outcome of that meeting?

22 A Well, they told me that these were serious charges
23 and-- Ed Bjorn was speaking. Lorie Morrell was speaking
24 some, taking notes. And Mr. Bjorn asked me to explain to him
25 why I was making-- Why I felt the need to write this memo.

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1 At that point I told him that the reason I left
2 UniNet in 1992 was because of John Bjorn, because he was
3 harassing me. And that initially he had flirted with me, and
4 he changed his behavior towards me by harassing me to the
5 point where I had to quit.
6 I said, I have spoken to another woman who I knew
7 left under strange circumstances. Her name was Sue Foreman.
8 And that she had told me also that he had flirted with her
9 and that she was terminated abruptly, which she felt was no

reason.

And at that point I said, and he is also dating, you know, an employee now. And I just said, I had to have something done about it.

And the response was-- I recall Lorie Morrell saying to me, what do you expect us to do, fire him? They also said they would-- Mr. Ed Bjorn said he would conduct an investigation into the charges.

They asked me to describe what kind of flirtations I was talking about. And I did that.

Q Were they taking notes at that meeting?

A Yes, Lorie Morrell.

Q All right. How did the meeting end?

A The meeting ended-- Well, Pam had said, is she still going to be required-- Pam was angry right off the bat. She said this put her in a really bad position and she

wished I hadn't done it.

Q When did she tell you that?

A Because I had given her, because she was right in my office, the memo first. And-- I am sorry. I lost my train of thought.

Q I was asking you how the meeting concluded.

A It lasted about an hour with me explaining these things and the way I felt and that I felt that it was happening again and I had to do this.

And, you know-- And they just basically, Ed Bjorn said, well, have a nice, you know, he was kind of jovial about it, have a great Thanksgiving and have a drink and maybe you can calm down a little bit or something, because I was very, very nervous. I was, I was very nervous.

And we left for the four-day Thanksgiving holiday.

Q You were promised an investigation would be made?

MR. SILVESTRI: Objection to the form of the question, leading.

THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q What did you-- What, if anything, did you come
away with from that meeting as to what the personnel at
UniNet or SCCI would or wouldn't do in regard to your
complaints?
A They told me that they would conduct an internal

investigation and get back with me. And they said that
during the investigation they didn't want me to contact Mr.
Bjorn nor Mr. Bjorn to-- And they were going to tell Mr.
Bjorn not to contact me until the investigation was over.
Q All right. Did you take any action on your own
prior to the conclusion of any investigation that was made?
A Oh, yes, I did.
Q Why?

A What are you talking about?
Q Well, you took some action?
A Oh, you mean after I sent the memo?
Q Yes.
A Yes. I went to the EEOC.
Q Why did you do that and not wait for the outcome of the investigation that was promised?
MR. SILVESTRI: Objection to the form of the question, leading.
THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q Did you have-- Tell the Court why you went to the EEOC and filed a complaint when you did.
A Over the Thanksgiving holiday I was so upset that I couldn't, I couldn't eat and I couldn't sleep. It was beginning to affect my health, I believe I have stated in the memo on the 23rd.

The reaction that I got from Pam was anger. The

reaction that I got from Lorie Morrell was anger. And the reaction that I got from Ed Bjorn was as though he was making light of it.

And I just didn't feel that the father of the person that I was accusing of this would be very impartial in conducting an investigation. And I became very scared that I needed, you know, some other support. These people are all friends and family members, and the reaction was just, I just could tell that they-- The reaction was not positive at all.

MR. SILVESTRI: Your Honor, move to strike that answer as being opinion and conclusion.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q All right, Ms. Burns. Following the filing of the complaint, did John Bjorn ever provide you any sales assistance between the time of the filing of the EEOC complaint and your termination, the termination of

your
19 employment on March 10, '95?
20 MR. SILVESTRI: Objection to the form of
the
21 question, leading.
22 THE COURT: Objection overruled.
23 BY MR. POCHUCHA: (Continuing)
24 Q You can answer it.
25 A No.

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1 Q And what was your understanding, if any,
regarding
2 your chain of command at UniNet following the time
of the
3 filing of the EEOC complaint until your discharge on
March 10
4 of '95?
5 A The chain of command, according to John
Bjorn,
6 was-- You mean other than what, I was told that I
wasn't
7 supposed to contact him?
8 Q You were told--
9 A Well, the chain of command was Pam
Edelman, John
10 Bjorn and Ed Bjorn.

Q And who told you that?
A John Bjorn.
Q And was that the chain-- Was that the way you were supposed to proceed if you had a complaint or a question about a policy during the period from November of '94 through March of '95, or was there some other way for you to proceed?
A As far as I knew, since I wasn't supposed to talk to Mr. Bjorn, I could only talk to Pam Edelman.
Q All right. And did the-- The policies and procedures at the Frederick, Maryland office as of November 28, '94, were they changed at any time in relation to that date?
A Yes.
Q When? When were they changed and how?
A Just shortly thereafter there became all these new

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rules and regulations or policies and procedures.

Q Is there a memo reflecting that in the exhibits?
A There is probably a couple regarding the policies.
Q Do you recall what the policy was regarding termination?
A Oh, yes. The policy regarding termination and the practice has always been that a salesperson would be first placed on probation to give them a chance to correct their activity or their sales numbers, whichever the case may be.
And then if they could not, it was up to the discretion of management as to whether they would be terminated or they would be given an extension, you know, based on, I guess, how they felt.
MR. SILVESTRI: Objection to the answer, Your Honor, guessing.
THE COURT: Objection overruled.
BY MR. POCHUCHA: (Continuing)
Q All right. Now, look at Tab 39.
Is that the--
A That's one of the first ones that came out.
Q You say there were more than that too?

A Continuing through my termination, there were so many policies and procedures running around that office-- I am sorry, but it just was very confusing. I didn't know what was going on.

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Q All right. And how were policies enforced generally at UniNet during your terms of employment there?

A How were they enforced?

Q Yes.

MR. SILVESTRI: Your Honor, could we have some foundation for that question?

THE COURT: Yes. Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q All right. Were there-- How were the policies and-- Strike that.

Are you familiar with the manner in which policies and procedures were established during your second term of employment at UniNet?

A Yes.
Q And how was that?
A John Bjorn would write a memo saying, here is a new policy.
Q And how were those policies set forth in those memos enforced?
A They were enforced--
MR. SILVESTRI: Objection, Your Honor, foundation again.
THE COURT: Well, if she knows. Objection overruled.
A They were enforced inconsistently. And when Bjorn

wanted, Mr. Bjorn wanted to enforce them and on whom, that's how they were enforced.
Q Okay. When you say that, are you-- Strike that.
Was there any such enforcement of a policy regarding you personally between November 28 of

'94 and March
of '95?
A Yes.
Q Describe that for the Court, please.
A Well, the one that is coming to mind is that I wasn't allowed to call Karen Biesemeyer to check on my orders.
Q What was the policy?
A The policy was--
Q Let's back up a second.
What was the procedure for ordering equipment from the time that you first went to work for UniNet until the time of your termination? If you can do that in a rapid fashion, please.
A Okay. In my first term of employment, salespeople did their own ordering from vendors. In the second term of employment, after Todd left, Mr. Bjorn created a centralized purchasing department, which was in Herndon, and you had to go through Herndon to get your orders placed.
Q All right. And what happened when your

orders
25 didn't come in? How were you to know, if at all, what the

1 status was?
2 A Well, typically you would call the vendor to find

3 out-- You would tell them the order number and when is it
4 supposed to be shipping. And-- Or you could call Karen
5 Biesemeyer, who was the purchasing agent, to find out what
6 the status of it was.
7 Q Is that what the policy was? Is that what a
8 salesperson was supposed to do?
9 A Well, that policy changed several times. Sometimes
10 I was told, I think, that I was not supposed to call
11 vendors. And then sometimes the policy changed that I wasn't
12 supposed to call Karen. That Carol could call Karen or Pam
13 could call Karen.

Q Who is Carol?
A Carol was the receptionist at the time in the Frederick, Maryland office.
And Bjorn had said that he didn't want me to call vendors or Karen anymore. But he said, okay, you would have to go to Pam, or Carol could call. And then that changed again.
It was very confusing. I wasn't sure at which point in time what I was supposed to, what procedure I was supposed to be following.
Q All right. Tell the Court what the 60-day rule is.
A A 60-day rule is a policy that Mr. Bjorn created, I

believe it was June of 1994 after Todd had departed, indicating that any account at UniNet which was past due on their invoices, on any invoice over 60 days, would not, he would not deliver their computer equipment to them.

And Mr. Bjorn created that policy after I had faxed down an order for Loudoun Hospital Center, a very large order. And he then, the next morning, faxed this policy over. And I wasn't worried about it because I had gotten the order in before the policy was created, but he still wouldn't fill the order.

Q All right. Was that-- Did that policy remain in effect from June until the time that you left UniNet, or was it changed?

A I think it did, but it was just enforced like the other policies were enforced. Like it wasn't enforced consistently. In other words, like I said, the other policies weren't.

So, a policy could be put in place. That doesn't mean it would be enforced constantly, and it wasn't. And when Bjorn wanted to enforce it, he would enforce it.

Q Other than the chain of command being different, what-- Describe for the Court briefly the incidents that occurred with your sales procedures between the filing of your EEOC complaint in November and the termination of your employment in March.

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And if you need to refer to your log briefly, you can do so.

A I am sorry. Can you repeat the first part of that question?

Q I just wanted you to describe briefly for the Court each of the incidents, if any, that occurred regarding your difficulties with sales from the time of your filing the EEOC complaint until the termination of your employment.

A Oh, there were just countless incidents that happened,

And the problem was, was that no one seemed to care. I was losing customers. I was losing business. Yet these new quotas had been placed on me and all these new rules were placed on me. And it was an impossible situation for me to deal with because I didn't know whether to complete all these new requirements or to try to sell to my, or handle my existing customers. It was just very, very difficult.

My customers were constantly complaining about late deliveries. And when I would say something to my supervisor, Pam Edelman, she would not respond to me. And, you know, so I would write a memo so that it would be visible and hopefully getting a response from someone.

Q How many memos did you write between that period?

A I don't know, but probably quite a few.

Q And why did you write them?

A As I just said, all these incidences of people not responding and acting as though the Frederick office was in trouble of going under and all those rumors that were going around, and they didn't seem to care that I was losing business.

And when I would say something to them, they would ignore me.

Q Who is they?

A Well, like Pam. And one time, you know, there was an incident with Fort Detrick that I went over in tears to Lorie Morrell. And she just said, I am sure there is a logical explanation. It was as though these people had turned zombies or something.

MR. SILVESTRI: Objection, Your Honor.

A And so, I wrote the memos--

MR. SILVESTRI: Objection to the characterization as being opinion and conclusion, Your Honor. Should be stricken from the record.

THE COURT: Objection overruled.

BY MR. POCHUCHA: (Continuing)

Q Was there ever-- Did you ever have a meeting with anyone regarding a conclusion of UniNet's or SCCI's investigation of your complaint?

A Yes, yes, I did.

Q Okay. Who did you have that meeting with and what

occurred at that meeting?

A Okay. It was towards the end of January. And I was given a phone call by Leo Harris asking, telling me that the internal investigation had been concluded and could I come over and meet with him. And I did.

And it was over at Southeastern. Lorie

Morrell was

present and taking notes.

Q All right. And what, if anything, did Mr. Harris or Ms. Morrell advise you regarding the outcome of their investigation?

A That they could find no sexual harassment or harassment on any basis.

I have a--

Q You have what?

A I made notes on that meeting, and I do have that written down if I can use them to-- But there were like 18 points that Mr. Leo Harris had given me at that meeting.

MR. POCHUCHA: Your Honor, may she refresh her recollection with those notes?

THE COURT: Does it make any difference what they said?

MR. POCHUCHA: Well, we anticipate Mr. Harris will say something different than what the notes said, although we

have the--
THE COURT: You can't impeach him before he gets on

the stand.
MR. POCHUCHA: Right. I got you.
THE COURT: He may never get on the stand. We don't know.
BY MR. POCHUCHA: (Continuing)
Q Were you satisfied with the meeting?
A No.
Q Were you given any additional assignments at that meeting?
A I was told that-- Leo said that his response had been sent to the EEOC and that I would see the answer there. And that I basically-- I mean, he said that all this, you know, that he had found no sexual discrimination or harassment. And that this EEOC thing was costing a lot of time and money and that I was the only one who

could make it
go away.
MR. SILVESTRI: Objection to the answer, Your Honor. The question was, were you given any additional responsibilities or actions.
THE COURT: Objection sustained.
MR. SILVESTRI: Thank you.
BY MR. POCHUCHA: (Continuing)
Q All right, ma'am.
Did management remain constant at the Frederick, Maryland office after that meeting?

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A I am not sure.
Q Pam Edelman was your manager at the Frederick Maryland office as of the date of the meeting?
MR. SILVESTRI: Objection to the form of the question, leading.
MR. POCHUCHA: I'm just trying to move it along, Judge.

THE COURT: Well, we already heard the answer to that question.

MR. SILVESTRI: We did.

MR. POCHUCHA: I know.

MR. SILVESTRI: Sorry, Your Honor.

BY MR. POCHUCHA: (Continuing)

Q Well, tell the Court who your managers were at the Frederick, Maryland office from January 1 to March 10 of '95.

A Pam Edelman and then John Lyons.

Q All right. And when did John Lyons become your manager?

A February 1, approximately.

Q And when was that in relation to the meeting that you were just discussing?

A That meeting was on January 25. So, shortly thereafter.

Q All right. What, if anything, did Mr. Lyons change when he became manager?

A He brought in a whole new set of policies and procedures.

Q And how did those policies and procedures affect you, if at all?

A Well, they were actually not as bad-- Not as difficult for me to achieve as the ones that Pam Edelman had given me, because she had wanted me to make like 100 phone calls a day in addition to taking care of my existing accounts, which I had, I had existing accounts. The other two male sales reps had-- You know, didn't, didn't have really too many clients.

And so, anyway, you know, it was very difficult for me to handle the existing accounts and complete these tasks.

Well, Mr. Lyons-- In addition, Pam Edelman was accompanying me to sales calls to critique my sales pitch.

Which I thought was very, for a senior sales rep who has been

proven to be a very high producer, I thought was very unusual, wasn't necessary.

But anyway, the question was--

Q How did things go with John Lyons as your manager?

A He was able to get computer equipment to me for my customers. And actually, I had a really good month that month.

Q During your time at UniNet, did you ever have any formal reviews of your performance?

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A During which time period?

Q Any time period.

A I had a review with John Lyons.

Q When was that?

A It was at the end of February.

Q '95?

A '95, that's correct.

Q And what did that review consist of?

A He told me that I had-- That I was

cooperative,
had a good attitude. He enjoyed working with me. My sales
were great. He actually even complimented me on the fact
that my technical skills were better than what he had
originally thought they were. And that was it.
Q Was that oral or written or--
A Well, it was oral. I asked for him to put, if he
could put, was going to put it in writing, and I would like
to get it in writing. And he said, I'll let you know
tomorrow.
And he went down to Herndon and came back and told
me that John had told him that he can't put it in writing.
Or that, something about-- That we would put it in writing
later or something.
Q Well, with that review, how did you foresee the
month of March of '95 to be for you?
MR. SILVESTRI: Objection to relevance.

THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q How was the month of March of '95 for you at UniNet?
A Pretty bad.
MR. SILVESTRI: Objection to the form of the question.
Are we talking about performance or some other aspect?
THE COURT: Objection overruled.
BY MR. POCHUCHA: (Continuing)
Q All right. Tell the Court what happened to you at UniNet in March of 1995.
A In March of '95, after I had this great review from John Lyons, several things occurred between March 1 and March 10. And I do have a memo that indicates some of the problems that were very unusual happening.
Q It is at Tab 66, if you would like to refer to it.
You need not unless--

A I think the worst thing that happened was-- My largest account was Loudoun Hospital, and I was very proud of that account. I had gotten it when I was in Herndon. It turned out to be one of the largest accounts that UniNet had ever had. And I had a great relationship working with them.

And Mr. Bjorn had, as I had told you before,

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started holding their orders for 60 days, or that they were past due. And he insisted that I get them current on their payments. And I did. It was the first time in the entire time that they had been a customer of UniNet that they were in fact current at the time that this, that I wrote this memo.

John Bjorn called me on the phone with John Lyons and said that he was going to be making, he was

going to make
an appointment to go out and talk to them about their past payment problems.

And Loudoun Hospital at this point in time was very frustrated with UniNet as a vendor. They--

MR. SILVESTRI: Objection, hearsay.

THE COURT: Objection overruled. I am not sure what good it does us to go into all this. If she lost the client, she lost it. I am not sure it makes any difference--

MR. POCHUCHA: This is probably the most important testimony of the retaliation that you will hear, the retaliatory discharge, Judge.

This is the-- These are circumstances of her termination that really--

THE COURT: All right. You go ahead.

BY MR. POCHUCHA: (Continuing)

Q Try to keep it brief.

A Okay.

Q But just-- Don't go through the memo. Just describe the circumstances of your termination.

A There were several things, which is documented in this memo, that happened to me within a short period of time, all of which were very, very irregular and very, very upsetting to me.

And the worst was that Loudoun Hospital had called me and said that John was--

Q Don't tell us what Loudoun Hospital told you.

Just what you did as a result of Loudoun Hospital calling you.

A I wrote a memo to Leo about it. And I asked him if he thought that that made any good business sense at all, to go and talk about past payment problems and a FedEx bill to the largest customer that they have had when the account was in fact now current.

Q What did he tell you?

A He came over and said that in fact he had told John

19 Bjorn to go on a goodwill visit. And that what I had related
20 that John had told me, he just ignored that fact.
21 Q How was your health at that time, ma'am?
22 A This period was so stressful that I-- I can't even
23 describe it. I have described it. I am sure it is in
24 documents. But the anxiety of going through all this and not
25 knowing what they were going to-- I felt entrapped because

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1 they were-- I felt that the company was blocking my ability
2 to sell, which is income for me, yet giving me all these
3 requirements with threats of putting me on probation if I
4 couldn't make my quota, yet not providing me the equipment.
5 And it was just a very frustrating thing.
6 And what happened on that day is when I learned
7 that he was going to my top account and felt that that

was
going to destroy the relationship that I had with them-- And
in fact, I did get a call saying that he was going, and he
did call and said he was going out there. I had what I
learned later from my doctor was a panic attack while I was
typing this memo.
And it was about noon, and there was no manager in
the office. And I began-- When I was typing this, I began
to feel like I had to get out. I was just shaking and I--
It was just a horrible feeling. And I had experienced it
just recently on my drive home from work one night when all
this was going on, and I almost ran into a truck.
And Natalie saw me, my daughter, and we almost
called an ambulance. We didn't know what it was.
And anyway, so, this was happening again. I had to
leave. There was no manager in the office, and I wanted to

23 get something out as best I could that I was leaving work so
24 they would know.
25 And so, I left work. And I came back the next

1 morning.
2 Q And what happened when you came back the next
3 morning?
4 A I was terminated.
5 Q What were you given as the reasons for your
6 termination?
7 A That I left work early without a manager's approval
8 and that I was unable to follow company procedures and
9 guidelines.
10 Q And had you refused to follow any company procedure
11 or guideline at that point?
12 A No, not that anybody ever made me aware of.
13 Q And you mentioned your doctor. What doctor were

you referring to, the doctor who told you about what a panic attack was?

A Dr. Titus.

Q And then tell the Court just briefly what your history with Dr. Titus is. Not the whole history, but what you were seeing him for.

A I knew Dr. Titus, and I have been seeing him occasionally since 1985.

Q For what purpose?

A Anxiety.

Q What type of doctor is Dr. Titus?

A A psychiatrist.

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Q And what arrangements did you have with him to see him? In other words, did you see him once a month? Did you see him once a week? Did you see him on some other scheduled basis? Or did you see on another basis?

A I would see him when I-- As needed.

Q All right. Following your termination, what efforts did you make to find additional employment?

A I forgot to say something else about the termination, if that's okay.

I did tell them the reason why I left. Okay, I am sorry.

Q Did you have--

THE COURT: Before you go into the employment, why don't we take a brief recess now.

MR. POCHUCHA: Thank you, Your Honor.

NOTE: At this point a recess is taken; at the conclusion of which the case continues as follows:

BY MR. POCHUCHA: (Continuing)

Q Ms. Burns, tell the Court what you did to find employment subsequent to your termination from employment at UniNet in March of '95.

A I interviewed with some computer companies.

Q All right. When did you commence interviewing with the computer companies following your termination? I mean, did you go the next day?

A Well, I answered ads.

Oh, not the next day, no. I am sorry. It was, I guess-- It wasn't-- I started to go on some interviews, but when the company or the interviewer would ask me what happened to my previous job, which is, of course, a logical question, tears would start coming to my eyes, and I couldn't conduct myself very well in the interviews.

So, I went in and got some assistance from my, from Dr. Titus. And eventually I was able to, you know, interview better. And I interviewed, like I said, for a few companies.

Q Did there come a point in time that you were able to get a job?

A Yes.

Q And what-- Tell the Court what that job was.

A It was a sales representative-- I was a sales representative for Loudoun Computer Services, Incorporated.

Q And when did you go to work, do you recall?

A I believe it was August of '95.

Q All right. And how long did you work for Loudoun Computer Services?

A Until December of '97.

Q Did your experience at UniNet have any impact upon your departure from employment at Loudoun Computers?

MR. SILVESTRI: Objection to the relevance.

THE COURT: Objection overruled.

A Yes, it did.

Q Describe how it did.

A There was an occasion in December where I had a meeting with my, with my boss about a commission. And I had been also-- Had told him that I was having some, you know, some female problems and I wasn't feeling too good. It kind

of all led up.

But anyway, in this meeting-- Oh. We were discussing the commissions. And I had mentioned again that I hadn't been feeling too well because of the female problems.

And he suddenly became enraged for no apparent reason. And he said, if you bring that up one more time-- He said, You are this close. And he was yelling and his face was red.

And I--

Q Who is he?

A Dana Hume. He is the owner, president of the company.

And I just was unable to go back to work. It had reminded me-- I tried to take a couple days off first to kind of calm down. And during the time that I was taking-- I asked to use up my sick leave, and he said that was fine. And I still was unable to go back because I didn't want to go through again what I was afraid might happen to me

again with
24 the retaliation from UniNet.
25 And so, I asked him for an accommodation whereby I

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1 could work from home.
2 Q How big was that company? I mean, how many people?
3 A Probably ten.
4 Q Continue. What response did you get to your
5 request to work at home?
6 A He said no way. And I said, well-- You know, I
7 told him about my anxiety problem. I explained to him before
8 that this incident had affected me, you know, to the point
9 where-- I believe I had mentioned-- Well, I had mentioned
10 to him about I was sensitive to the way he was.
11 He was another boss who had a very fiery temper.
12 And it had worried me that, how I was going to react. In

fact, he did blow up at me another time. And I told him, I said, please don't ever do that to me again. Because he had been aware of UniNet and the problems that I had.

But this time he did it, and I just, I couldn't go back to work. And I asked for accommodation to work from home. And I was refused that accommodation. And I began to be retaliated against in the way that I had been able to work from home before when I was sick and communicating with my accounts and calling in and taking care of them. And we had voice mail. And I felt that it was a reasonable request.

But they started-- They took away my voice mail and-- Or Dana did. And he was becoming very angry--

Q Did he agree that you could work at home ultimately?

A No, he did not.
Q Did he tell you that--
A He wanted my resignation.
Q What did you do?
A I told him that I didn't want to lose my job. You know, I was just hoping that he could let me work from home, which I felt that, you know, I could do okay. Because my customers were calling me saying, you know, we want you.
They like interfacing--
MR. SILVESTRI: Objection, Your Honor, hearsay as to the customer statements.
THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q Tell us what the final outcome of that situation was.
A I couldn't go back. And it was kind of like I never resigned, but he wrote me a later saying, I accept your resignation.
Q When was that?
A December of '97.
Q And what have you done since then to

pursue gainful
employment?
A I am sorry, but I haven't tried to-- I haven't been able to go back to work.

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Q Why not?
A Well, because the experience that I had at Loudoun Computer I felt happened because of what had happened to me at UniNet. And I just-- I just don't think I can deal with it again.
And I am trying to think of a way where I could do something. And I have thought about possibly real estate to where I wouldn't work, have to work with a male, somebody who might-- I am just afraid of the situation happening again.
I also in Loudoun Computer Services, Dana Hume also had, had approached me a couple times and was doing things

like pulling lint off my thing. And I am not-- And he would say things like, get your pretty little butt down to the Navy and sell something--

MR. SILVESTRI: Objection, relevance, Your Honor.

THE COURT: Objection sustained.

MR. SILVESTRI: Thank you.

BY MR. POCHUCHA: (Continuing)

Q Subsequent to your departure from Loudoun Computer, what point in time were you capable of working?

A It depends upon what you mean capable. I mean-- Mentally--

MR. SILVESTRI: Your Honor, this has already been answered. This witness has already said that she can't go back to work.

THE COURT: Objection sustained.

BY MR. POCHUCHA: (Continuing)

Q All right, ma'am. What charges have you filed

against UniNet with the Equal Employment Opportunity Commission?

MR. SILVESTRI: Objection, Your Honor. I don't know the relevance of this. It is already in the record through this witness that she has filed EEOC charges.

MR. POCHUCHA: Are you stipulating both charges filed and both right-to-suit letters?

MR. SILVESTRI: Yeah. I don't have a problem with that.

MR. POCHUCHA: That would complete my questioning, Your Honor.

THE COURT: All right, cross-examination.

MR. SILVESTRI: Thank you, Your Honor. I will try to be very brief.

CROSS-EXAMINATION

BY MR. SILVESTRI:

Q Does the clerk have a set of the defendants' exhibits? Are they in front of the witness?

Could we have Volume 1 put in front of the witness,

24 please?

25 Okay. Good afternoon, Ms. Burns. Could you turn

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1 to 26, please, of that binder? And you will see there a--

2 You will see there a memo from Miss Edelman, your supervisor,

3 to you dated December 5, 1994.

4 A Yes.

5 Q Does she not say in that memo that you did not lose

6 valuable time selling, but rather choose to mismanage your

7 time by writing memos and wasting time following up orders

8 that are already being tracked?

9 Doesn't she say that to you in the memo?

10 A She does. It is not a true statement.

11 Q She said that to you in the memo, is that correct,

12 ma'am?

13 MR. POCHUCHA: The memo speaks for itself, Your

14 Honor.

Q And doesn't she tell in the memo that you are hired to do a job of selling?
A Yes.
Q Didn't you take that memo as her instruction that you were to stop writing memos and to start selling?
A No.
Q Okay. Now, I would like you to turn to your Exhibit 28.
Excuse me, my Exhibit 28. I'm sorry, my Exhibit 28.
A Which is in the same book?

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Q Same book, ma'am.
To a page that is entitled on the top, January 24, 1995. It is your entry in your logs.
The bottom of the page is numbered 719. I think they are consecutively numbered. That might help you.
A Okay, I have the page.

Q This is your entry that you were discussing in your direct testimony of your meeting with Leo Harris on January 25, 1995 where he went over the findings and conclusions of UniNet's investigation, isn't that correct?

A That's correct.

Q And these are the 18 points you referred to in your direct examination, aren't they, that are listed on pages Bates stamp 719 and 720?

A That's correct.

Q And on number 14, don't you list there that Leo Harris tells you you must abide by policies?

A Yes.

Q Doesn't he say that there?

A Yes, that says that there, yes.

Q And doesn't he say-- Don't you report that he says on paragraph 5 that you had a tough time accepting management decisions?

Do you see paragraph 5 on page 719, ma'am?

A I see that.

What was your question about it though?

Q Don't you write there that Leo Harris told you that you had a tough time accepting management decisions?

A Yes.

Q And don't you write there that Leo Harris, the chairman of the Board of UniNet, said that the decisions are made not based upon what is good for-- Based upon what is good for the corporation, not based upon what is good for an individual?

A Yes. That's what I wrote that he said.

Q And didn't he tell you that at the meeting?

A That's probably very close to what he said, yes.

Q Let's turn to Defendant's Exhibit 7. That's a probation memo you got from Mr. Lyons on February 2, 1995, is that correct?

A February 1, 1995.

Q This is dated February 2, but it is signed on February 1, correct?

A He gave it to me on the 1st. It was dated the 2nd.

Q But there is no dispute that you got it, right?

A No.

Q And this is the same month that you testified Mr. Lyons gave you a good review, is that correct, February 1995?

A That's correct.

Q And doesn't this memo tell you that it is expected

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that you, as a probated representative, will adhere to all policies and procedures and display a positive and constructive attitude toward their job?

A Yes, it does. But this probation was reversed.

Q And you asked that it be reversed, right? You asked that the probation be reversed, correct?

A Yeah, because it was inadvertent. It was not-- It

was not legitimate.

Q And Mr. Lyons reversed it, didn't he?

A Yes, he did.

Q Let's turn to Exhibit 12.

A Excuse me?

Q Exhibit 12, please.

A Can I finish my answer from before?

Q I thought you did, ma'am.

A Okay. Well, not quite.

Q Well, why don't you finish then.

A Well, John Lyons reversed it, but it had gone through John Bjorn first.

Q Oh, I see. So, your testimony is that Mr. Bjorn had a handle in reversing your probationary period? Is that what your testimony is?

A Well, Mr. Lyons had told me that he was going to be discussing it with Mr. Bjorn.

Q All right. Thank you. Let's look at your exhibit,

excuse me, Exhibit Number 12 on my tabs, which is a memo dated February 8, 1995.

A Okay.

Q Doesn't this say on the bottom of the page there--

This is the memo that revoked or rescinded your suspension,

wasn't it?

A Yes.

Q And in rescinding your suspension, didn't Mr. Lyons

tell you that you would be subjected to established

disciplinary steps should you fail to meet any part of your

job requirements or to work within the existing structure at

UniNet?

A Yes.

Q Okay. And you took that memo to be a threat that

you had to stop writing memos and complaining, didn't you?

You took Mr. Lyons memo to be a threat, didn't you?

A No. When I wrote-- I wrote a response back to

this memo. I thought that it wasn't a threat. It was more

like, why would he be bringing this up to me because--

Q Well, let's look at the next exhibit.
I am sorry, finish your answer.
A It was not mentioned to me before about-- I don't know why I would, why he would have said that.
Q Let's look at the next exhibit, Exhibit 13, Ms. Burns.

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That's your response, isn't it?
A Yes.
Q And look at paragraph number 3 on page 2. Don't you say there: I found the memo of 2/8/95 to be extremely negative and threatening. It appears to me that because you reversed my probation, I will now be under extreme scrutiny as far as fulfilling my job requirements. And working within the structure at UniNet, will be punished if I fail in any way.
Don't you say that to Mr. Lyons in this

memo?

A Yes, I am sorry. I didn't realize I used the word threatening there, but it was in fact-- I did have a problem with--

Q You were put on probation-- You were put on probation, ma'am, because, among other things, you had not met your sales quotas, is that correct?

That's the reason why Mr. Lyons put you on probation, wasn't it?

A That's what it says.

Q And it's a fact, isn't it, that in nine out of the 12 months prior to the time you went on probation, you missed your sales quota at UniNet?

A I don't know. I would have to-- I am not sure.

Q You don't have any reason to believe that that statement is incorrect sitting here today, do you?

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A I would-- I know that I missed my sales

quotas a
2 few times, but I don't know if it is what you are saying.
3 I don't want to--
4 Q And this is in a time period, this 12 months that
5 we are talking about, this is in a time period where you were
6 supervised not only by Pam Edelman, but also by Todd
7 Heidelberger, correct?
8 A That's correct.
9 Q And we already established in your direct
10 examination that when you were supervised by Todd
11 Heidelberger, you had no contact with Mr. Bjorn, correct?
12 You testified to that, didn't you?
13 A Yeah, so far as I could remember, I didn't recall
14 any.
15 Q And we already established in your direct testimony
16 that from the time that you were filing your EEOC charge at
17 the beginning of the meetings with the company in November,
18 around Thanksgiving, you had no contact with Mr.

Bjorn from
19 then until the time of your termination, isn't that correct?
20 A That's incorrect.
21 Q All right. Now, the contact that you did have with
22 him were memos that you sent to him, correct?
23 A That's incorrect.
24 Q And your testimony today is that you had
25 conversations with John Bjorn between November, late November

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1 of 1995 and the time you were discharged in March?
2 A Yes, I did.
3 Q All right. Those conversations related to customer
4 complaints and business issues?
5 A It was related to business issues, I guess you
6 would say.
7 Q Okay, business issues.
8 Isn't it a fact, ma'am, that Mr. Bjorn approved a
9 first extension of your, I say extended salary to $25,000 in
10 April of 1995? Excuse me, '94.

A Yes, he did. Leo had signed off on it.
Q Isn't it a fact that Mr. Bjorn approved it, correct?
A Yes.
Q And your testimony really is that nothing happened at that company without Mr. Bjorn having a hand in it?
That's your testimony, correct?
A I don't think I said that. What I said was that he had the power to be able to make or break deals if he so desired.
Q So, your testimony as you are sitting here today is that he did not have a hand in everything that happened in that company, correct?
A Oh, a hand in everything that happened? That's pretty-- But, yeah, he was the ultimate authority as far as,

you know, pretty much on everything.
Q You have no personal knowledge about what

involvement he had with any specific decision on a customer or on a delay, is that correct?

A Okay, personal knowledge means I--

Q You saw him do it.

A Okay. Saw him what?

Q Saw him take the action or heard him talk to the customer or heard him make the decision.

A During what time frame?

Q During the time frame in 1994.

A Oh. Well, I know he made the decision to go to Loudoun Hospital to talk about their past payment plan.

Q I will give you that, ma'am. That's fair to say.

But besides that decision, do you have any personal knowledge of John Bjorn's involvement in any other decision with respect to any other customer at UniNet?

A Involvement with the customer?

Q Yes.

A Involvement with the customer.

I just-- I am not sure.

Q Thank you, ma'am.

Now, isn't it also a fact that in April of 1995

24 when you asked for that extension of salary, you also gave
25 Mr. Bjorn an option, you requested a transfer to the Herndon

1 office, didn't you?
2 A I might have, yeah.
3 Q Well, let's look at it. Let's look at the exhibit
4 then so that we can actually make sure about that.
5 Would you turn to Exhibit 16, please.
6 Bear with me for a minute, Your Honor. I will come
7 back to it.
8 Isn't it a fact, ma'am, that no other sales
9 representative that you know of got two extensions of their
10 salary guarantee, their salary extension?
11 A I am not privy to that information.
12 Q You don't know one way or the other, is that
13 correct?
14 A I know that salaries were discussed frequently with
15 management and negotiated, you know, salaries and commissions

16 negotiated.
17 Q Let's turn to Exhibit 37. Have you got it?
18 A Yes.
19 Q It is Exhibit 37.
20 A Right.
21 Q This is your memo to John Bjorn regarding
22 compensation dated April 15, 1994, is that correct?
23 A That's correct.
24 Q Do you see there on the bottom that you asked him
25 either to consider one of two options, giving you an

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1 extension or transferring you to the Herndon office?
2 A Yes.
3 Q That's where Mr. Bjorn was working, wasn't it?
4 A Yes, but he was already in direct report with me.
5 Q He was already what?
6 A Todd Heidelberger had already left, which was my
7 protection. And since he was dealing directly with me
8 anyway-- He had taken away my territories. And I really

didn't want to go there, but I felt that the promise had already been broken and the damage was probably already done, so I felt safe.

I knew he wouldn't let me do it, though, because I just know he didn't want me there.

Q And, Ms. Burns, Mr. Bjorn was working out of the Herndon office, wasn't he? That is his base of operations, correct?

A That's correct.

Q And you went-- You put that in as an option because you weren't making as much money as you needed to make at Frederick, correct?

A Did you say that I wasn't making as much money as in Herndon before?

Q You weren't making as much money as you needed to make in Frederick. That's why you said, I want to transfer to Herndon.

A No. Well, it was basically because they had taken away my territory and reduced it under, you know, what-- So, the opportunity wasn't as great for me to make my sales. And I was anticipating that, you know, it might be very difficult.

Q This is two weeks after Mr. Heidelberger left, correct?

He left at the end of March, didn't he?

A He left in March. I'm not sure exactly what time we are talking about.

Q So, all the stuff that has happened that you are complaining about at Frederick is stuff happening under Mr. Heidelberger's control there, isn't it?

A I don't understand that question.

Q Well, let's break it down to make sure you understand it.

This memo--

THE COURT: Isn't that just a matter of

argument?

MR. SILVESTRI: Yes, it is, Your Honor. I will move on.

THE COURT: All right.

BY MR. SILVESTRI: (Continuing)

Q Before there was a 60-day hold rule, there was a 90-day hold rule, right?

A I think that's right.

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Q Right. And so, the hold rules were put in as an incentive to get customers who were not paying us on time to pay us on time, correct?

A That was, that was the intention, yeah.

Q And UniNet's terms are 15 days, aren't they?

A That's correct-- No-- Well, yes.

Q Fifteen days, right?

A Yeah, they typically-- They say 15 so that they hope the customer will get them in by 30.

Q And isn't it true that you got exceptions to the

90-day rule for customers?

A I am not sure. I would like to see that 90-day rule again, because I am not really sure what that says.

Q Let's look at Exhibit 44, ma'am.

Isn't that a memo to Mr. Bjorn from you dated May 12, 1994 requesting exceptions to the 90-day rule?

A No. That is Pam Edelman writing to John Bjorn.

Q It is Pam Edelman. But that is writing on behalf of yourself, correct?

A Right. I see now that it is because I wasn't aware of the 90-day rule and that's why--

Q Where does that say that in here? Right at the beginning, right?

A Right.

Q But it says: Pat Burns wasn't aware that specific

accounts were past due and, therefore, had not

contacted the
Accounts Payable Department.
It doesn't say you were not aware of the 90-day
rule, does it?
A Let me just look at this.
Q Sure. Take your time. Tell me when you are finished looking at it, ma'am.
A I remember now what this is about.
I was informed that there is a 90-day rule. And I
was told by Mr. Bjorn that-- Or he told me, rather, that you
would know which accounts were over 90 days. So, you would
have an opportunity to go collect from them. And I wasn't
given that opportunity.
So, therefore, I thought that it, you know, wasn't
justified.
Q And you were asking for a commission to be paid on
these accounts that actually eventually got paid over 90
days, correct?
A Well, yes. Because if I had had a chance to go get

20 the account to be current, I would have made commissions.

21 But since I wasn't told, I didn't know that I had to-- I

22 didn't know that they were overdue.

23 Q And Mr. Bjorn granted that exception, didn't he?

24 A I believe he did.

25 Q Yeah, let's look at Tab 46, ma'am.

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1 Didn't he grant-- The document at Tab 46 Didn't

2 he granted you the exception to the policy?

3 A Yes, he did.

4 Q And isn't it also a fact that you were granted

5 exceptions for your customers under the 60-day no-ship rule?

6 A Granted exceptions for my customers?

7 Q Isn't it true that UniNet made exceptions for your

8 customers, your accounts, on the 60-day rule?

9 They shipped product before the customer paid when

10 the customer was late. Isn't that true?

11 A Well, how it worked was, as I said before, John

Bjorn would enforce that policy when he wanted to, and at other times he didn't. I am not sure that I would call it granting an exception.

Q Well, you got an exception from the 60-day rule for your customers, didn't you?

Let's look at Exhibit 44, ma'am. Excuse me, Exhibit 16.

There is a little marking down at the bottom of the page. It has the letter at the bottom. I want you to look for the letter Q.

A Excuse me?

Q The letter Q.

A I know. The book is falling apart. Sorry. Okay.

Q It is a December 9, 1990 memo from Miss Edelman to

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you.

A Are these chronological? Q. Oh, I see. Okay. I have got it.

Q Look at the second paragraph of that memo. Doesn't this say that John Bjorn has not enforced the policy with respect to Loudoun Hospital? In fact, he has allowed shipments to Loudoun with invoices past 90 days since this policy was put into effect. Doesn't this memo, your memo to Pam Edelman, say that, ma'am?

A The point there is that--

Q Does it say or it not, ma'am?

MR. POCHUCHA: Your Honor--

Q Does it say it or not?

MR. POCHUCHA: Your Honor--

MR. SILVESTRI: Your Honor, the question calls for a yes-or-no answer.

THE COURT: It calls for a yes-or-no answer. And then she may explain her answer.

MR. SILVESTRI: That's fine. I will hear the yes-or-no answer and then she can explain it.

BY MR. SILVESTRI: (Continuing)

Q Doesn't that memo say what I quoted?

A Yes, it does.

Q Now you can explain it.

A Okay. This is-- What I was trying to state is that the policy, the effect to the customer of the policy, and to me of trying to abide by policies and guidelines would have been almost impossible because they were enforced inconsistently.

And he would ship to Loudoun Hospital sometimes for-- I don't know why the reason would be. Maybe he-- But sometimes he would, and sometimes he wouldn't. I think it might have had to do with what mood he was in or whether he was angry at me or--

But to the customer, when I am trying to keep them under 60-- They can't understand, well, how come we are getting shipments-- It was very frustrating for me because I couldn't explain why am I getting, why are they

getting
15 shipments when their account is over 60 days and why are they
16 getting it when they are not.
17 So, if I'm trying to get them under 60 days and
18 they know they are getting them sometimes, they are less
19 likely to abide by that policy themselves.
20 If I explained myself correctly.
21 Q Isn't it a fact, ma'am, that you complained about
22 Pam Edelman's job to John Bjorn?
23 A I don't know.
24 Q Okay. Isn't it a fact, ma'am, that you complained
25 about John Lyons to Ms. Morrell and Mr. Harris?

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1 A When you use the word complain, I don't believe I
2 am complaining.
3 In every instance I am bringing, I am trying to
4 bring these problems that I am having to management's
5 attention.

Q And you are addressing the problems by saying that Miss Edelman and Mr. Lyons are causing them, aren't you?

A Not necessarily, no. Because I know that Mr. Bjorn has the ultimate authority over them to be able to either correct the problem that is occurring or not.

I may be writing the memo to them saying that they are not doing it, but I know that they are being directed by John Bjorn because he is their ultimate report. And I think someone has testified here that he, that they don't have authority on their own.

Q Didn't you accuse Miss Edelman of misinforming you on information pertaining to an account?

A I didn't-- I brought it to her attention.

Q You told her, you misinformed me, didn't you?

A Correct.

Q And didn't you tell her in a memo that she wasn't listening to you?

A It appeared that she-- As I think I testified before, it did appear that no one was responding to me.

Q But didn't you complain that she wasn't listening

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to you, Miss Edelman?

A Can you refer me to-- Are you referring to a particular memo?

Q The same exhibit, Exhibit 16, ma'am. It is number BB, B as in boy.

A Okay.

Q Have you got it in front of you?

A Yes.

Q Didn't you say there on the second paragraph: You do not seem to listen to me concerning the problems we have in the FMD office with dissatisfied customers?

Didn't you say that to Miss Edelman in this memo?

A Yes, because it did appear-- That's the appearance.

Q Didn't you send a copy of this memo to John

Bjorn

and to Ed Bjorn?

A Well, if that was inhibiting me from doing my job--

Q Did you send it? You can explain why you sent it later.

Did you send it?

A Okay, did I send it? I am sure I probably did because they are copied on it.

Q And you carbon copied them on the memo?

A Yeah, right.

Did you say I could explain something?

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Q Sure.

A Well, as I was saying, is that what else was I to do if I wasn't able to do-- If Pam wasn't able to straighten out the problems that I was having in getting sales, which is the main requirement of the salesperson, that's what I was hired to do, then I would have to tell someone.

Q Now, in all the memos you wrote, isn't it true

that
there was only one memo that you sent to John Bjorn in late
November of 1994 that said that you were being harassed by
John? Isn't that correct?
A That I sent to John Bjorn?
Q All the memos that you wrote to all the people in
the company, to Leo Harris, to Ed Bjorn, to Pam Edelman, to
John Lyons, to Todd Heidelberger, all the memos that you
wrote to people in the company, there is only one memo that
you wrote that you said, I'm being harassed, is that correct?
A That's correct, but I would like to explain.
Q Explain all you want, ma'am.
A Thank you. During this period of time, number one,
I would like to say that during the month of January until
the investigation was over, I was advised not to write memos
to John Bjorn. So, I did not do that.
And secondly, I had explained in the meeting

of
24 November 23 that one of the things John Bjorn would do to
25 harass me would be to hold my orders and impede my sales.

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1 The logical conclusion here, I don't like using the
2 word harassment--
3 THE COURT: Ms. Burns, this is not a time to argue
4 your case. Your lawyer will do that after awhile.
5 THE WITNESS: I am sorry.
6 BY MR. SILVESTRI: (Continuing)
7 Q Isn't it true, ma'am, that you have no personal
8 knowledge that Mr. Bjorn participated in the decision to
9 terminate your employment?
10 A He was in the Herndon office. But if he did not,
11 it would be very unusual.
12 Q Isn't it true that you have no personal knowledge
13 of his involvement in the decision to terminate your
14 employment?

It calls for a yes-or-no answer, ma'am. Just answer yes or no.

A That's correct, I don't, I don't have personal knowledge.

Q And isn't it also true that the memos that you started writing to the company in late 1994 and early 1995, you were advised to write those memos by your physician, Dr. Titus?

A I think I started writing memos before I met with him, but he did say that that would be a good way to-- Because I had to go to Dr. Titus. I was experiencing such--

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I needed to go to him to endure this, what was happening to me. And he said--

Q Ma'am, did he advise you to write the memos?

A He suggested.

Q And you followed his suggestion?

A Well, I continued. But I made sure that I

was not
confrontational because I didn't wanted to be.
I wanted to keep my job at UniNet.
Q And isn't it also true that you sent documents,
UniNet documents to your friend, Mr. Munford in Virginia, who
has no role in UniNet during the time when you were employed
there?
MR. POCHUCHA: Objection to relevance, Your Honor.
THE COURT: What relevance would that have?
MR. SILVESTRI: It shows the extent that she would
go to make sure that people knew that she was complaining,
Your Honor. It is also misconduct.
THE COURT: Objection overruled.
A I did send some memos that were being passed back
and forth to Mr. Munford, who is a very dear friend of mine,
who was helping me get through this horrible experience.
BY MR. SILVESTRI: (Continuing)
Q Isn't it also true that you can't point to a

single

24 memo that you wrote to anyone where you took the blame for a

25 difficulty or problem with a customer?

1 A I think I did.

2 MR. SILVESTRI: Deposition page 266, please.

3 THE COURT: Are you about to wind down here, Mr.

4 Silvestri? It is getting late in the afternoon.

5 MR. SILVESTRI: I will be five minutes, Your Honor.

6 THE COURT: All right.

7 MR. SILVESTRI: I will withdraw. We'll just move

8 on.

9 BY MR. SILVESTRI: (Continuing)

10 Q Isn't a fact, ma'am, that on May 10, 1995, just

11 after your discharge, you wrote to your doctor saying that

12 you were ready, willing and able to return to work?

13 A In May of '95?

Q Yes, ma'am.
A I don't know.
Q You have no recollection of writing your doctor in
May of 1995 saying you would return to work?
A I did at some point.
Q I am just going to refer the Court to Exhibit 47.
Isn't it also true that on March 12, 1998, after your discharge from Loudoun, you requested an opinion from
your doctor that with his treatment you were able to work?
A I believe that's probably true.
Q And you did that for the purposes of providing
support for your claim of discrimination against Loudoun

Computer, is that correct?
A I'm sorry--
Q Didn't you ask your doctor to send that note to the
Virginia Commission on Disabilities?
A Loudoun Computer? I am sorry, I was not

following
you. Excuse me.
Okay. So, you are talking about Loudoun Computers?
Q Yeah. Didn't you in February of 199-- In February or March of 1998, didn't you ask your doctor to write an opinion that with his treatment you could perform work?
A Yeah, I suppose, I probably did.
Q Exhibit 47 again, Your Honor.
And isn't it also true that you have taken the position in this case that you were unable to find or unable to work up until at least January 1 of the year 2000?
MR. POCHUCHA: Your Honor, we don't take that position. We will stipulate that.
MR. SILVESTRI: Well, Your Honor, their answers to interrogatories say it.
BY MR. SILVESTRI: (Continuing)
Q Don't you say that in your answers to interrogatories, ma'am?
A Yes. I believe that's what they said.
MR. SILVESTRI: That's all the questions I have,

25 Your Honor.

1 THE COURT: Do you have anything further?
2
3 REDIRECT EXAMINATION
4 BY MR. POCHUCHA:
5 Q Mr. Silvestri asked you about knowledge of Mr.
6 Bjorn's involvement with accounts.
7 Do you recall an account involving Mr. Teets?
8 A Yes.
9 Q What was Mr. Bjorn's involvement with that account?
10 A The Teets account was one that shortly after I had
11 filed my EEOC claim I had an opportunity to get an order for
12 a lease of equipment from Teets and Associates. And Mr.
13 Bjorn said that he would not process the order.
14 Q Was the order ever processed?
15 A Yes.
16 Q How did that happen?
17 A Leo-- Mr. Teets had written a note to Leo because

they were personal friends, and--

Q Okay. Do you have a client called Will Coxen?

A Yes. I had a potential opportunity with Will Coxen.

Q Did Mr. Bjorn have contact with that client?

A He was asked by John Lyons to call and try to help close the deal with Will Coxen. It was a networking opportunity.

P. B. Burns - Redirect

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Q What occurred?

A Well, first of all, I never got word. John Lyons kept stalling as to whether Mr. Bjorn had actually contacted him. And about three days later he said, yes, he did. He said he hadn't been able to get through to them, but he called and said no, that we couldn't, the opportunity would not-- We lost the opportunity or something along those lines. Or we couldn't bid on the SMC equipment,

something
along those lines. But we lost the deal.
And I contacted my customer one more time just to
see if there was, you know, anything else. And he had told
me that--
MR. SILVESTRI: Objection, Your Honor, hearsay.
THE COURT: Objection sustained.
BY MR. POCHUCHA: (Continuing)
Q How many salary extensions did you receive during
the second term of your employment?
A One.
MR. POCHUCHA: Thank you. That's all I have, Your
Honor.
MR. SILVESTRI: No recross, Your Honor.
THE COURT: Thank you. You may step down.
NOTE: The plaintiff stood down.
THE COURT: You said had a doctor's deposition you
wanted to admit?

MR. POCHUCHA: Yes, sir.

It is Dr. Titus, who was-- The subpoena was issued for him. Counsel consented to his de bene esse on Monday. He will be available after today though.

THE COURT: It will be admitted.

MR. POCHUCHA: Your Honor, the only other item I wanted to make sure-- Is it my understanding that the exhibit book would be deemed admitted, the items included?

THE COURT: I am prepared to admit it, unless he wants to object to some of them.

MR. SILVESTRI: Give me one minute, Your Honor.

THE COURT: I am not going to pay any attention to hearsay objections and that sort of thing. Without a jury, there isn't any use worrying about that.

MR. SILVESTRI: Some of these exhibits aren't really-- Some of these exhibits weren't really provided. I don't think they are in the exhibit books at this point

in
18 time.
19 Does the Court have a record of our objections
20 being filed on this?
21 THE COURT: Well, if you filed it, it is in the
22 record.
23 MR. SILVESTRI: Okay. That's the whole point I was
24 going to make.
25 THE COURT: I mean, I haven't gone over the record

1 in this case just to be sure what has been filed and what has
2 not.
3 MR. SILVESTRI: I was going to, without having to
4 go through all the memos that are in there that have hearsay
5 statements in there, to put my objections on the record with
6 respect to those hearsay statements.
7 I understand the ruling, which is I am not going to
8 look at hearsay, but I wanted to make sure that the--

THE COURT: Is there objection to anything in his book other than hearsay? Because I am going to overrule all your hearsay objections.

I am going to admit all of them unless there is some substantive objection that you have to one of those exhibits.

MR. SILVESTRI: No, Your Honor.

My only objection at this point is hearsay. Thank you.

THE COURT: All right. The hearsay is overruled, and they are admitted.

MR. POCHUCHA: And the book is in. And that would conclude our case, Your Honor.

THE COURT: That's his case.

MR. SILVESTRI: Your Honor, I would like to make a motion for judgment.

May I be heard on it?

THE COURT: Yes.

MR. SILVESTRI: The only pleading we have from the plaintiff in this case is the complaint. There is no amended complaint filed.

The complaint has four counts in it.

The first count is quid pro quo sexual harassment. That is what she labels it, and that's what the allegations in there state.

The second count is hostile environment sexual harassment. That's what it states, and that's what she labels.

And the third count is sexual discrimination disparate treatment.

The forth count is retaliation.

And the Court has already dismissed on the motion for summary judgment the sex discrimination count. And I am moving to dismiss the rest of the counts based upon a lack of evidence put forth by the plaintiff from which a reasonable

trier of fact could infer that there is any establishment of the principle of prima facie causes, elements of sexual harassment or retaliation.

And I have got a couple of statements to say on that. The first is that we haven't heard any conduct that amounts to quid pro quo sexual harassment. There was no conduct with Ms. Burns or with any other witness produced by

Ms. Burns that amounts to this-for-that sexual harassment allegations.

Second is that none of the conduct identified by Ms. Burns or her witnesses amounts to a hostile environment sexual harassment case. We don't even have physical touching. We don't have any kind of propositions for sex. We don't have anything that any of the courts in this district or the Fourth Circuit has labeled to be a

hostile
environment.

Now, plaintiff's theory in this case is shifting, and it has shifted throughout the case. And right now it is shifting to, well, a hostile environment is this, quote unquote, nonsexual harassment that I suffered.

Well, she put on the testimony of Todd Heidelberger, who was a supervisor. And Mr. Heidelberger testified that Mr. Bjorn took the same kind of conduct toward him that he did toward Ms. Burns.

And other witnesses that Mr. Pochucha called had the same thing to say, that Mr. Bjorn acted the same way, got angry with men as he did with women.

And if that's the evidence of the plaintiff in this case, and certainly that's his case in chief, then there isn't any gender basis for which the Court can find a disparate treatment claim or a harassment claim based on gender. That is his testimony, the testimony he submitted.

It doesn't make any difference whether Mr. Bjorn yells at Ms. Burns one time more, two times more or is a couple of octaves higher or a couple of octaves lower. The real element of this case is whether or not he has introduced evidence to show that she was treated differently than other employees because of her gender. Not because she was Patricia Burns. Not because she protested her salary. Not because she took on the challenge of John Bjorn. But because of her gender. And instead of putting that evidence on, what she has done is put evidence on that the employees were treated equally.

There is also no evidence, no direct or circumstantial evidence that she has put on that links her termination to the filing of the EEOC charge. And that is

Count 4, which is the retaliation claim.

Finally, there is no evidence that she has put on the record that satisfies the Fourth Circuit standard for involvement of SCCI as an employer here. In fact, most, if not all, the testimony pertained to testimony of UniNet's policies and UniNet's employees and president.

The only testimony on the record with respect to SCCI is that on one occasion in dealing with her complaint of harassment and her request for a salary extension where she said that the president ignored her, did the president of SCCI get involved.

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There is no testimony on the record as to the basis of his involvement or why he was involved or whether or not he made any decisions with respect to those issues. And she

has to put that evidence on the record with respect to those claims.

Thank you, sir.

THE COURT: I understand your position. Do you want to respond?

MR. POCHUCHA: I would, Your Honor.

While counsel suggested there is a shifting approach in this case, there is a very detailed pleading in the response to the motion for summary judgment as well as in counsel's opening argument today.

Ms. Burns' theory is that the treatment that she received was because she is a female, because Mr. Bjorn made flirtatious advances towards her to encourage her to enter into a romantic relationship with him. Those advances alone would not be sufficient to constitute sexual discrimination or sexual harassment. But the rejection of those advances caused a course of conduct to occur with her for the rejection of any advances or any desire.

And that didn't happen to any men. It

happened to
23 Ms. Burns. It happened to Ms. Schaeffer. It happened to Ms.
24 Temple, the same sort of advances. So, you have a pattern of
25 conduct there.

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1 In addition, the severity of the treatment that Ms.
2 Burns received, contrary to counsel's recollections,
3 plaintiff's counsel would submit that there is evidence from
4 both Ms. McCaffery as well as Ms. Kearns as well as Mr.
5 Leresche that the treatment visited upon Ms. Burns was
6 distinctly more severe and different from treatment visited
7 upon any others.
8 So, I would submit to the Court at this stage of
9 the proceedings, with the inferences falling in her favor,
10 that we have proved that case.
11 In addition to that, the retaliation, Ms. Burns has

testified that her whole treatment was different after the filing of the complaint. That she was taken outside the chain of command and that there was no legitimate business reason for her termination. That her termination was outside the normal procedure of providing a probationary period.

Her evidence is that she was the largest producer, certainly in the Frederick office. And that she was sick on the day that she left, she came back the next day and was terminated for leaving early. There is no evidence that anybody else was ever terminated in that fashion.

There is no evidence of any legitimate business purpose for her termination.

And finally, Your Honor, in regard to SCCI and UniNet, I would suggest to the Court that the testimony is

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replete with references that Mr. Bjorn represented

them to be
a, one to be a parent company.
There is in the UniNet handbook, which I believe is
Plaintiff's Exhibit 108, it shows the chain of authority within the company. And the ultimate authority for decisions
is made by SCCI.
And so, for those reasons, I would submit to the
Court that also at this stage, with every inference being
taken in favor of the plaintiff that she has proved a
sufficient case of SCCI and UniNet, alter-ego relationship
between one another. Certainly control.
And the responses of UniNet-- Excuse me, of SCCI
personnel to the investigation in this matter is further
evidence directly on the issues that are before the Court,
the sex discrimination as well as the retaliation.
THE COURT: All right.
MR. SILVESTRI: One point, Your Honor, that perked
my ears up.
That is that Mr. Pochucha just said that there

is
20 no evidence in the record with respect to whether any other
21 employee was treated the same way, being discharged after
22 leaving work early.
23 He is right. Mr. Pochucha did not put on any
24 evidence of any other employee who was similarly situated to
25 Ms. Burns who was treated differently for the purposes of

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1 proving his retaliation claim. In fact, the only thing he
2 put on was Ms. Foreman's testimony, who came in and said that
3 I was fired after I called my boss an asshole.
4 And if that's not as close to what we have got in
5 the situation, that is being fired for misconduct-- I am not
6 saying it is the same, it is apples and apples. It's
7 apples--
8 THE COURT: There is a little difference, yeah.
9 MR. SILVESTRI: --and oranges. But the point is

that the only evidence we have of discharge here is another employee was peremptorily fired, and she is not similarly situated to Ms. Burns.

Thank you.

THE COURT: All right.

Well, I find this motion is well taken. I don't believe that there is any evidence to go forward on the quid pro quo harassment claim. There just simply isn't any evidence here of sexual harassment. Also no evidence of a hostile work environment.

I also find there isn't any evidence to go forward on the retaliation.

Cross-examination has developed a number of exhibits that question the performance of the plaintiff. The plaintiff disagrees, but the plaintiff is not the one that decides what the performance is in the organization.

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There just simply isn't any evidence that her

termination was related in any way to the filing of this complaint.

And I also find that there is not sufficient evidence to hold SCCI in this case. There is simply evidence here that this was a parent company that may have had an ownership interest in it.

And the fact that there was an investigation at one time, because somebody from another corporation comes in and does an investigation, doesn't hold them liable.

And I have just told you generally, what I am going to do, I am going to grant the motion. And you will get something in writing from me that will set it out in some greater detail.

The motion will be granted.

And if we have no further business, we will adjourn until tomorrow morning at 9 o'clock.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Norman B. Linnell, CP, CM, CE

UNINET MEMORANDUM

EXHIBIT NO. 61

To: Pat Burns

FROM: John Lyons

RE: Your Probationary status

DATE: February 8, 1995

TIME: 3:41pm

As per John Bjorn's memo, the decision on your probationary status has been referred to me and I have thoroughly reviewed the situation surrounding the issues you have identified. After speaking with Karen, Pam, Nancy, Scott, and Carol the following facts have come to light:

A. Karen received a call from you around 9:00 AM on Friday, Jan 27th. During this call Karen expressed some uncertainty as to which specific products on worksheet #8110 had been received, and she said she would call you with the specific information. Sometime before 10:30 AM, that same day she called back, and spoke with you concerning the specific items which had been received, and requested that you fax down a copy of the packing slip (from the worksheet) so the received products

BEST AVAILABLE COPY

could be delivered. At 1:30PM, Karen had still not received the Packing slip as requested. Therefore, I called to speak with you, and was told that you were out of the office, I then requested that Mike McLane find the packing slip and fax it to me ASAP.

B. On Monday morning, John Bjorn had a discussion with Pam to confirm that the month end close out had gone smoothly, she inquired about how to handle the invoicing of worksheet #8110. John responded that anything that was shipped in January should be invoiced in the same month, at that time John was told that the final batch for January was completed on Friday and that the month end close out had already been started. In my conversations with both Nancy and Carol, it has been confirmed that the final batch was completed between 3:OOPM and 4:OOPM on Friday die 27tti, and that the month end close out had been started early on Monday, Jan 30tli. If the invoice had been given to Carol prior to 3:00PM on Friday, it would have been included in January's sales figures.

C. The company has never stated that the problems with sales in the Frederick, MD office are related to Management.

However, because you seemed to be unclear as to which day UniNet, FMD was closing its sales books for January, and in order to get on with the business of selling, you are not being placed on probation. However, you must be aware are that there arc policies, procedures, and deadlines place on all employees. Meeting sales goals and adhering to established deadlines is a

sales representatives responsibility. Furthermore, you will be subject to established disciplinary steps should. you fail to meet any part of your job requirements or to work within the existing structure at UniNet. The purpose of sales probation is to identify deficiencies in sales duties or skills which lead to inconsistent sales. As you are aware, the average monthly margin dollars you have generated, has improved since April of 1994, however, you were below your margin plan in nine (9) of twelve (12) months in 1994. 1 hope you will work with me to improve your sales performance.

cc: John Bjorn
cc: Ed Bjorn

MEMORANDUM

TO: John Bjorn

FROM: Pat Burns

RE: Problem with Motivation

DATE: March 9, 1995

TIME: 11: 17am

CC: John Lyons
Ed Bjorn
Lori Morrell
Leo Harris

The following occurrences in the recent past have caused extreme stress and anxiety and have impaired my motivation to sell.

1. Deducting money from my expense check without my knowledge to pay for a management error.

2. Making an appointment to visit my top account, Loudoun Hospital, to discuss past problems with their account which have already been resolved (by me). This is my livelihood that is being interfered with. They have already

expressed to me that this *meeting is not*[1] *necessary.*

3. Making a "weird" phone call to a potential new client not identifying yourself as President of UniNet, and saying you would not bid on the type of equipment they wanted. ($40,000+ sale.)

4. Impeding my inability to follow up on orders by not allowing me to call vendors or Karen, making me look unresponsive to my customers.

Pat

P.S. I will be leaving work today because of this. I am unable to perform my duties .

Exhibit 66

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[1] portions in italics handwritten on original document

UniNet

1573 Tilco Drive
Suite A-2
Frederick, Maryland 21701

SE-FMD-1034
March 10, 1995

EXHIBIT NO. 67

Patricia Bums
Route 2, Box 188
Bluemont, VA 22012

Dear Ms. Burns:

Recently, there have been many pieces of correspondence, as well as face to face conversations, where you have expressed disagreement with UniNet management guidelines and with corporate policies that are in place and apply to all employees.

You have stated that, unlike other employees you cannot perform and operate in accordance with corporate policies, procedures, and the UniNet management process. Further, you left the office without getting the approval of your manager and stated in writing that you are unable to perform your duties as long as our policies remain in force.

Since you have stated that you cannot perform your job under management guidelines and unless we change corporate policy, we have no choice but to give you two weeks notice. We will give you two weeks of pay in lieu of that notice and you art terminated effective Friday, March 10, 1995.

Sincerely,

/s/ John S. Lyons
Sales Manager

JSL/sj

Phone (301) 662-4907
Fax (301) 694-0175

Exhibit 67

POLICY AND PROCEDURE REVIEW
FREDERICK OFFICE

1/31/95 **EXHIBIT NO. 74**

The nature of UniNet's corporate philosophy is to offer computer support and network integration services in the commercial environment. To achieve this goal, UniNet strives to provide clients with superior solutions, designs, and implementation strategies. This goal has been designated by UniNet's managers and owners. The responsibility of following and promoting this strategy is the duty of UniNet's sales' force. The following defines the tasks and, expectations necessary from each sales representative to pursue this goal.

1) New client development. Achieving our desired standards requires a consistently growing and developing client base. This can only be gained by regular prospecting in the form of both phone and in person cold calling. All hardware sales representatives will be given a minimum of one day a week during which the entire sales force will be required to perform phone cold calling. These times are Wednesdays from 10:30 to 12:00 for the Herndon Office and Tuesdays from 10:30 to 12:00 for the Frederick Office. These duties may be increased if the need arises or include in person cold calling.

2) Focused marketing. UniNet sales representatives are expected to target both hardware and networking clients. It is desired that hardware sales representatives achieve monthly sales margins of 27% or above. This mandates that all representatives sell a ample amount of networks and networking related products to produce this margin. Solely focusing on hardware sales will not produce

satisfactory results.

3) Adherence to margin parameters. All hardware sales will be at 20% margin or higher. All networking sales should be at 35% or higher. Senior sales representatives and managers can approve deals from 17%-20% (this should be the exception and not the rule). Only sales managers can approve deals below 17%.

4) Attitude. Employees of UniNet are expected to exhibit a willingness to work and a desire to improve their standing in the company. Attitudes conveying constant dissatisfaction or an inability to work with certain individuals are not acceptable.

5) Teamwork. A team environment is necessary for UniNet's success. All members of the sales group are expected to be able to work together to achieve business goals. There is not room in this environment for personal problems or individual biases. When these factors come into play in the work place; UniNet suffers.

6) Sales probation, Any sales person who fails to reach their sales quota for three consecutive months will be placed on probation. The purpose of this is to assist that individual in restructuring their sales routine to gain sales consistency. Failure to follow guidelines during sales probation may result in a lengthier probation or dismissal.

7) Disciplinary probation. Individuals whose performance and/or attitude is destructive to the rest of their group, management, or UniNet as a whole may be placed on disciplinary probation. Failure to adhere to the guidelines

of this probation may result in dismissal.

8) Timeliness. Business hours are 8:30-5:30. Sales reps who are not in the office during these hours are expected to be at meetings with clients (which will be in the meeting book), delivering products (which will be clarified before leaving UniNet), or on another sales oriented activity (all of which will be cleared with John Lyons beforehand),

I have read and understand the above policies and procedures and will endeavor to adhere to them in my work for UniNet.

_____

Name Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA D, BURNS,
Plaintiff,

Civil Action No. 98-382-A

JOHN E. BJORN, et al.
Defendants.

DEFENDANT UNINET, INC'S RESPONSES TO PLAINTIFF'S INTERROGATORIES

COMES NOW the Defendant, UniNet, Inc. ("UniNet"), by and through its undersigned attorneys and responds to Plaintiff's Interrogatories as follows:

I. GENERAL OBJECTIONS AND OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

UniNet objects to the extent the general instructions and definitions seek the production of information or documents protected by the attorney/client or work product privileges, seek the production of information that is irrelevant, not likely to lead to the discovery of admissible evidence, are overburdensome, or call for the disclosure of information or documents prior to the

time set forth in the Scheduling Order to be entered in this civil action. UniNet also objects to the extent the general instructions and d6finitions place a greater or different burden on UniNet than is provided for under the Federal Rules of Civil Procedure.

UniNet further objects to the extent these interrogatories seek information from Southeastern Computer Consultants, Inc. SCCI"). The interrogatories are addressed to UniNet and UniNet does not purport to speak for SCCI.

For any interrogatory to which UniNet has objected on the basis that the requested information is proprietary and confidential, an agreed Protective Order will need to be entered before said information can be disclosed. A proposed Agreed Protective Order is attached for consideration. Any proprietary or confidential information disclosed herein is being provided to Plaintiff upon the condition that such proprietary or confidential information will be designated under the Agreed Protective Order that will be entered in this civil action.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1. Specify the gross income, net worth, annual budget and total number of employees of defendant for each year from and including 1990 to the present.

RESPONSE: UniNet objects because the request is overbroad and seeks irrelevant And proprietary information which is not likely to lead to the discovery of admissible evidence. The net worth of Defendant UniNet is not subject to disclosure unless and until Plaintiff establishes a prima facie case of discrimination

or sexual harassment At trial. Moreover, the annual budget of defendant UniNet is proprietary and confidential. Such information is irrelevant to the claims and defenses in this case. Subject to and without waiving these objections, UniNet responds as follows:

UniNet

Year	Gross Income	Number of Employees
1990	497,603	10
1991	2,498,714	12
1992	4,030,329	22
1993	4,928,358	25
1994	5,127,994	30
1995	4,778,252	28
1996	3,725,089	29
1997	3,746,064	28

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Interrogatory No. 11. If you contend that plaintiff s failure to follow company policy or procedure caused the termination of her employment by UniNet, then for each such policy or procedure identify:

(a) the substance of the policy or procedure;

(b) the date on which the policy or procedure was placed into effect;

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(c) the manner in which the policy or procedure was announced to employees of UniNet in general and to plaintiff in particular;

(d) the act or Acts of plaintiff which violated the policy or procedure;

(e) the time, place and manner in which plaintiff was advised that an act or acts had violated the policy or procedure;

(f) the time, place and manner in which plaintiff was advised that a future occurrence of the act or acts described in paragraph (e) above would result in the termination of her employment;

(g) all persons with knowledge of facts set forth in response to subparagraphs (a) through (f) above and provide a summary of the knowledge of each person identified in response to subparagraph (g) above.

RESPONSE: UniNet objects because the request is overbroad, unduly burdensome and seeks irrelevant and proprietary information which is not likely to lead to the discovery to admissible evidence. Subject to and without waiving these objections, UniNet responds as follows: On January 31, 1995, all sales representatives in the UniNet, Frederick office were given

two memos from their new sales manager, John Lyons entitled: (1) Policy and Procedures Review, Frederick office dated January 31, 1995, and (2) Needs and Concerns dated January 3 1, 1995, both of which outlined the tasks and expectations necessary from each sales representative. (See Exhibit to Response to Interrogatory No. I 1). Each of these memos referenced, among other things, the need to clear any personal time out of the office with management first. The Policy and Procedure Review also stressed the necessity of working within the UniNet structure, and that performance and/or attitude that was destructive to the rest of the group, management, or UniNet as a whole was unacceptable.

On February 1, 1995 (Probationary memos dated February 2, 1995, see Exhibit), each sales representative in the UniNet Frederick office was placed on probation. Based upon what

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appeared to be some confusion on Ms. Bum's part over the January 1995 month end closing process, her sales probation was changed to a written warning. However, the warning expressly stated that the requirements outlined in the January 31, 1995 documents applied to Bums and informed her that she would be subject to established disciplinary steps should she fail to meet any part of her job requirements to work within the existing structure at UniNet.

On March 9, 1995, Ms. Burns did not get the approval of for manager to leave work, but left a memo stating she could not perform her duties and was leaving. See Exhibit attached. UniNet believed that Bums' memo announced her resignation from employment. On March 10, 1995, when she did return to work,

it was determined that since she had stated that she could not perform her job under management guidelines, and had left work without approval, she would be terminated with two weeks pay in lieu of notice. UniNet then proceeded to process the conclusion of Bums' employment by paying her two weeks pay in lieu of notice.

Interrogatory No. 12. Identify each former employee of UniNet or SCCI whose employment was terminated upon the occurrence of or as a result of an act or acts of the employee, without prior notice to the employee that the occurrence of the act or acts would result in termination of employment.

RESPONSE: UniNet objects because the request is overbroad, unduly burdensome and seeks irrelevant and proprietary information which is not likely to lead to the discovery to admissible evidence. Subject to and without waiving these objections, UniNet responds as follows: All employees of UniNet are at will employees. As such, no employee is guaranteed employment for any specific term and may be terminated with or without cause. In the

ON BEHALF OF AND AS AN OFFICER OF UNINET, INC., I DO SOLEMNLY SWEAR UNDER THE PENALTY OF PERJURY, THAT THE MATTERS AND FACTS SET FORTH HEREIN ARE TRUE TO THE BEST OF MY

KNOWLEDGE.

UNINET, INC.:
By: /s/ Eric Harris
Eric Harris
Its: President

STATE OF *VIRGINIA*
COUNTY OF FAIRFAX, to wit:

I HEREBY CERTIFY that on this 8TH of May, 1998, before me, a Notary Public in and for the State and City aforesaid, personally appeared ERIC HARRIS on behalf of UniNet, Inc., who in my presence, allied his signature to the foregoing Answers to Interrogatories are true to the best of his knowledge, information and belief.

AS WITNESS my hand and Notarial Seal.

/s/Catherine S. White
Notary Public

My Commission Expires: 8/31/98

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Respectfully submitted,

UNINET, INC. and
SOUTHEASTERN

COMPUTER CONSULTANTS, INC.,
By Counsel

/s/ David J. Ervin
David J. Ervin, Virginia Bar No. 34719
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MILES & STOCKBRIDGE P.C.
10 Light Street
Baltimore, Maryland 21202
(410) 72776464

Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 1998, a true and accurate copy of the foregoing UniNet Inc.'s Answer to Interrogatories was faxed and sent by Federal Express and Scheduled Express, delivery prepaid to:

Larry A. Pochucha, Esquire
Jessica S. Jones, Esquire

COATES & DAVENPORT
5206 Markel Road
P.O. Box 11787
Richmond, Virginia 23230

Janis Orfe, Attorney at Law
THE LAW OFFICES OF JANIS ORFE, P.C.
4010 University Drive
Suite 102
Fairfax, Virginia 22030

/s/David J. Ervin
David J. Ervin